No. 693.

UNITED STATES OF AMERICA.

IN THE

SUPREME COURT

OF THE

UNITED STATES,

OCTOBER TERM, 1881.

JOSEPH A. THATCHER AND JOSEPH STANDLEY,
Plaintiffs in Error,

—*vs.*—

WATSON B. ROCKWELL,
Defendant in Error.

Brief by Plaintiffs in Error.

H. M. TELLER,
WILLARD TELLER,
Attorneys for Plaintiffs in Error.

Pearson, Printer, Washington, D. C.

Supreme Court of the United States.

JOSEPH A. THATCHER AND JOSEPH STANDLEY,
Plaintiffs in Error,
—*vs.*—
WATSON B. ROCKWELL,
Defendant in Error.

In error to the Supreme Court of Colorado.

This is a motion by defendant in error to strike from the docket for want of jurisdiction.

In the original record there was no writ of error, but the record contained the proof that such writ was allowed, and subsequently this court allowed a supplemental record, with the writ of error, to be filed.

The defendant in error now asks the court to determine the matter in controversy in the case on this motion, alleging that there is no federal question in the case. The writ having been allowed, the court must on this motion suppose it was properly allowed.

When the case is heard on the question whether the state court erred, or not, this court must then determine whether there was a federal question, and whether if there was, it was rightly decided by the state court, for to take

up the question whether there is or is not a federal question is to hear the case on this motion.

The federal question was raised by the plea of plaintiffs in error, found in the record on pages 13 and 14, folios 40 to 46 inclusive.

To this the defendant in error replied, admitting the bankruptcy, but alleging an assignment to L. C. Rockwell, his attorney, and Kate C. Rockwell, his wife, and that he had no interest in the claim, and was allowing it to be prosecuted in his name for his wife and said L. C. Rockwell, and that his assignee in bankruptcy had no interest in the claim.

The plaintiffs in error rejoined, denying such assignment to L. C. Rockwell and Kate Rockwell, and alleging that they were not the owners thereof.

See folios 44 to 48 inclusive.

The defendant in error alleged that the debt belonged to him for the benefit of his assignees, Rockwell and Rockwell, and the plaintiffs in error alleged it belonged to his assignee in bankruptcy for the benefit of his creditors.

It appears to fall within the provisions of the first paragraph of section 4,972 of the Revised Statutes of the United States.

If the replication was not admitted, but was traversed, then it was a controversy between the bankrupt and his creditors.

It will be seen by the testimony of the defendant in error, folios 87 and 88, that the assignment to L. C. Rock-

well was only a partial assignment, that is, of enough to pay him for his legal services in this and other cases.

It also appears that no written assignment was ever made to Mrs. Rockwell of the one-half of the claim.

See folios 89 to 101, inclusive.

Thus one of the main questions in the case was, who was entitled to the claim, Rockwell or his assignee in bankruptcy, and the determination must be as to whether there was or was not an assignment; and if there was, whether it divested the bankrupt of all right therein, or not.

We do not think this the proper time to discuss the question whether there was, or was not, a federal question involved; the case is here on a writ of error, declaring that such is the case, and we, therefore, propose to leave that question to be discussed on the final argument of the case.

The defendant in error also alleges that the case is in this court on appeal because it is recited in the bond that plaintiffs in error had appealed to the Supreme Court of the United States and were about to remove the case by appeal or writ of error.

The case was removed by the writ of error, and the bond is one on which defendant in error can recover if the case is ~~not~~ affirmed.

The writ appears to be in due form.

H. M. TELLER,
WILLARD TELLER,
Attys. for Plaintiffs in Error.

Office

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~511.~~ 229 32

THE NEWPORT AND CINCINNATI BRIDGE COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED OCTOBER 7, 1878.

Ok of Ins } Affirmed

8 May 82

SUPREME COURT OF THE UNITED STATES.

No. 511.

THE NEWPORT AND CINCINNATI BRIDGE COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

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1 At a stated term of the circuit court of the United States within and for the sixth judicial circuit and southern district of Ohio, begun and held at the court-rooms in the city of Cincinnati, on the first Tuesday of April, being the second day of that month, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States of America the one hundred and second—present the honorable John Baxter, circuit judge—among the proceedings had were the following, to wit:

THE NEWPORT AND CINCINNATI BRIDGE COMpany
vs.
THE UNITED STATES OF AMERICA. } In equity.

Be it remembered that heretofore, to wit, on the seventh day of March, in the year of our Lord one thousand eight hundred and seventy-three, came the said complainant, by Matthews, Ramsey & Matthews, their solicitors, and filed in the clerk's office of our said circuit court its certain bill in equity against the said defendant clothed in the words and figures following, to wit:

2 Circuit court of United States.

THE NEWPORT AND CINCINNATI BRIDGE COMpany
vs.
THE UNITED STATES.

Circuit court of United States. In equity.

UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

THE NEWPORT AND CINCINNATI BRIDGE COMpany
vs.
THE UNITED STATES. } In equity.

To the honorable the judges of the circuit court of the United States for the said district in chancery sitting.

The complainant, the Newport & Cincinnati Bridge Company, respectfully represents:

3 1. That by an act entitled "An act to incorporate the Newport and Cincinnati Bridge Company," approved on the 5th day of February, 1868, the general assembly of the commonwealth of Kentucky created a body politic and corporate, by the name aforesaid, with all the legal rights, powers, and privileges incident to such a corporation for the purpose of constructing a bridge from some convenient point within the corporate limits of the city of Newport, across the Ohio River to Cincinnati, in the State of Ohio, with authority to contract for the construction of said bridge, and to purchase or condemn, when necessary, and hold so much real estate as might be required by the company for the site of said bridge or sites for piers, abutments, and suitable avenues leading to said bridge, and such other land as might

be necessary, with a proviso that said bridge should be constructed so as not to obstruct the navigation of the Ohio River further than the laws of the United States authorize; and with power to lay railroad tracks for the passage of railroad engines and cars of all kinds over said bridge and its avenues and approaches, and to demand and receive reasonable rates of toll for the passing over said bridge of all persons, railroad cars, vehicles, and animals of every kind or description.

2. That by an act entitled "An act to amend the charter of the Newport and Cincinnati Bridge Company," passed by the general assembly of the commonwealth of Kentucky and approved on the 26th day of February, 1868, it was enacted that said company should have the right to contract, at any agreed sum or rate, with any railroad company chartered by the State of Kentucky or chartered by or organized under the laws of any other State of the United States, for the use of said bridge by the engines and cars, or for the purposes of said railroad company, and that it should be lawful for said bridge company to become merged into a new corporation with any bridge company organized under the laws of the State of Ohio to build a bridge across
4 the Ohio River in the manner therein described; and that when such consolidation should have been made and perfected in accordance therewith the several corporations parties thereto should be deemed and taken to be one corporation, possessing within said State all the rights, privileges, and franchises, and subject to all restrictions, disabilities, and duties of said Newport and Cincinnati Bridge Company under said charter and the said amendment thereto.

3. That, on the 3d day of April, 1868, the general assembly of the State of Ohio passed an act entitled "An act supplementary to an act entitled 'An act to provide for the creation and regulation of incorporated companies in the State of Ohio,' passed May 1, 1852," providing for and authorizing the organization of incorporated companies for the construction of bridges across the Ohio River, whereby it was enacted that any company organized under the same should have full power to construct and maintain a bridge as aforesaid, with suitable avenues or approaches leading thereto, and that said bridge might be constructed either with a single span or with a draw, as the company might determine; but, in either case, in order that said bridge might not obstruct the navigation of said river, the same should be built in accordance with the provisions of an act of Congress, approved July 14, 1862, entitled "An act to establish certain post-roads," or of any act that Congress might thereafter pass on the subject; that said company should have the right to fix reasonable rates of toll, and collect the same, for all persons, animals, vehicles, and property passing or transported over said bridge; that said company might lay down a railway track or tracks upon said bridge and its approaches, and should have the right to contract, at any agreed sum or rate, with any railroad company organized in said State, under any general or special law, or any railroad company organized in any other State of the United States, for the use of said bridge by the engines and cars, and for the purposes of said railroad company, and any such railroad company organized, or that might
5 thereafter be organized in said State, was thereby authorized to enter into such contract with said bridge company; and that said company should have the right to consolidate its capital stock with the capital stock of any bridge company in an adjoining State authorized to construct a bridge across the Ohio River in the manner therein prescribed, and that the two companies should thereupon be merged into one corporation, possessing within said State all the rights,

privileges, and franchises, and subject to all the restrictions, disabilities, and duties of such corporation of said State so consolidated; and it was further thereby provided, that any such company might fix and change the span and altitude of any bridge which it might erect and construct across the Ohio River, provided that the span of any such bridge be not less than three hundred feet in the clear over the main channel, and not less than two hundred and twenty feet in the clear in one of the next adjoining spans, and the height of the bridge, in the centre of the span over the main channel, should not be less than one hundred feet above the surface of the water at low water, measuring for such elevation to the bottom chord of the bridge, and such height above extreme high-water mark as might be provided in any act of Congress then in force, or which might thereafter be passed; but that these restrictions should not apply to any bridge built with a draw in accordance with the provisions of an act of Congress, approved July 14, 1862, entitled "An Act to establish certain post roads," or any act that Congress might thereafter pass on the subject.

4. That afterward, on the 3d day of April, 1868, an association was formed and organized into a corporation by the name of the Newport and Cincinnati Bridge Company, for the purpose aforesaid, in accordance with the provision of said act of the general assembly of the State of Ohio.

5. That afterward, on the 16th day of April, 1868, the Newport
6 and Cincinnati Bridge Company, the corporation chartered by the said acts of the legislature of Kentucky, and the said corporation, by the same name, organized, as aforesaid, under the said act of the general assembly of the State of Ohio, entered into an agreement and act of consolidation, whereby the same became and were merged into one corporation by force thereof and of said laws of the States of Kentucky and Ohio as aforesaid, under the name of the Newport and Cincinnati Bridge Company, with a capital stock of one million two hundred thousand dollars, divided into twelve thousand shares of one hundred dollars each, certificates thereof having been duly filed in the offices of the secretary of state of said States, as by said laws required, and duly authenticated copies whereof the plaintiff will produce, if required, and which said consolidated corporation, by the name aforesaid, is the plaintiff in this suit.

6. That afterward, by a joint resolution, giving the assent of the United States to the construction of the Newport and Cincinnati Bridge, approved March 3, 1869, it was resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, that the consent of Congress be and the same was thereby given to the erection of a bridge over the Ohio River, from the city of Cincinnati, Ohio, to the city of Newport, Kentucky, by the said The Newport and Cincinnati Bridge Company, a corporation chartered and organized under the laws of each of the States of Kentucky and Ohio; provided, that said bridge is built with an unbroken or continuous span of not less than four hundred feet in the clear from pier to pier, over the main channel of the river, and is built in all other respects in accordance with the conditions and limitations of an act entitled "An act to establish certain post-roads," approved July fourteenth, eighteen hundred and sixty-two; that said bridge, when completed in the manner specified in the said resolution, should be deemed and taken to be a legal structure
and should be a post-road for the transmission of the mails of the
7 United States; but Congress reserved therein the right to withdraw the assent thereby given, in case the free navigation of said

river should at any time be substantially and materially obstructed by any bridge to be erected under the authority of the said resolution, or to direct the necessary modifications and alterations of said bridge.

7. That, by the fourth section of the said act of Congress, entitled "An act to establish certain post-roads," approved July 14, 1862, it was enacted that any bridge erected under the privilege of the said act, might, at the option of the company or companies building the same, be built either as a drawbridge with a pivot or other form of draw, or with unbroken or continuous spans; provided that, if said bridge should be made with continuous or unbroken spans, it should not be of less elevation than ninety feet above low-water mark over the channel of the said river, nor in any case less than forty feet above extreme high water, as understood at the point of location, measuring for such elevation to the bottom chord of the bridge; nor should the span of such bridge, covering the main channel of the river, be less than three hundred feet in length, with also one of the next adjoining spans of not less than two hundred and twenty feet in length, and the piers of said bridge should be parallel with the current of the river as near as practicable; and provided, also, that if any bridge under said act should be constructed as a draw-bridge, the same should be constructed with a span over the main channel of the river, as understood at the time of the erection of the bridge, of not less than three hundred feet in length, and said span should not be less than seventy feet above low-water mark, measuring to the bottom chord of the bridge, and one of the next adjoining spans should be not less than two hundred and twenty feet in length; and, also, that there should be a pivot-draw constructed in every such bridge at an accessible and navigable point, with spans of not less than one hundred feet in length on each side of the central or pivot pier of the draw; and provided, also, that said bridge should always be opened promptly upon reasonable signal for the passage of boats, whose construction might not at the time admit of their passage under the permanent spans of said bridge, except that said draw should not be required to be opened when engines or trains were passing over said bridge, or when passenger trains were due, but in no case should unnecessary delay occur in the opening of said draw after the passage of said engines or trains; and by the fifth section of said act, it was enacted that any bridge or bridges erected under the provisions of said act should be lawful structures, and should be recognized and known as post-routes; and that the officers and crews of all vessels, boats, or rafts navigating the said Ohio River were required to regulate the use of the said vessels, and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation, construction, or use of any of the bridges erected or legalized under the provision of the said act.

8. That the plaintiff, under the authority of the said laws of the States of Kentucky and Ohio, and the said joint resolution and act of Congress aforesaid, and in conformity with the provisions thereof as aforesaid, on or about the first day of March, 1869, commenced the erection and construction of a bridge across the Ohio River from Newport, in the State of Kentucky, to Cincinnati, in the State of Ohio, a drawing of the plan and design of which is hereto attached as a part thereof and marked Exhibit No. 1.

The chief object of the company in projecting the said bridge was to furnish means of connecting the railroad terminating in Cincinnati and Newport, and thus to form a continuous line of railway between the Eastern cities and the Southwestern States, and especially to connect

the tracks and depot of the Little Miami Railroad, already and for many years previous established on the bank of the Ohio River, in Cincinnati, immediately east of Eggleston avenue, with the terminus of the
9 Louisville, Cincinnati and Lexington Railroad Company, in Newport, at a point nearly opposite on the Kentucky shore; and as the said charters and laws granted to said company by the States of Kentucky and Ohio authorized the construction of a bridge for highway as well as railroad traffic, an ordinance of the city of Newport, granting the right of way for said bridge through its streets required that it should be constructed and used for the passage of vehicles and foot passengers across the Ohio River as well as for railroad purposes.

9. That, owing to the proximity of the terminus of the Little Miami Railroad in Cincinnati to the site necessarily selected for the bridge, and the sharp curvature necessary to connect the tracks of that road with the bridge, it was deemed most expedient and advisable to avoid the excessive grades necessary to attain the high level required for a bridge with unbroken or continuous spans of an elevation not less than ninety feet above low-water mark over the channel of the river at the point of location, and not less than forty feet above extreme high water, measuring for such elevation to the bottom chord of the bridge; and it was therefore by the company determined to adopt the alternative authorized by the fourth section of the act of Congress aforesaid, approved July 14, 1862, by building the same as a draw-bridge with a pivot draw, the span over the main channel being unbroken and continuous, not less than four hundred feet in the clear from pier to pier, as required by the said joint resolution of Congress approved March 3, 1869, and not less than seventy feet above low-water mark, measuring to the bottom chord of the bridge, and one of the next adjoining spans not less than two hundred and twenty feet in length, with a pivot draw at an accessible and navigable point, with spans of not less than one hundred feet in length on each side of the central or pivot pier of the draw, the piers of said bridge made parallel with the current of the river as near as practicable.

10 10. That the position of the main channel of the river, at the proposed site of the bridge was found and ascertained, upon consultation with a number of the oldest and most reliable pilots navigating the river between Cincinnati and Pittsburg; and being at that point close to the Ohio shore, it became necessary that the span next adjoining the span over the main channel, and required to be two hundred and twenty feet wide, should be placed south of the four hundred feet span over the main channel, and that the pivot span should be located next adjoining and south of the two hundred and twenty feet span, which would, however, leave it in an accessible and navigable point of the river, when the water was at a stage making it important or desirable for boats to pass through the draw span.

11. That, after considering several designs for the accommodation of the mixed railway and highway traffic, the said plan, of which Exhibit No. 1 above referred to is a design, was adopted by the company and is described, by reference to said exhibit, as follows:

The bridge was to consist of three parts, viz: a central opening between the trusses of the bridge, for the passage of railway trains, and on each side of the bridge a roadway, supported on iron girders, extending beyond the trusses, for vehicles and foot-passengers.

The railway portion of the bridge was to extend from the east side of Eggleston avenue, in Cincinnati, to the north side of Taylor street in Newport. The highways were to extend from the south side of Front treet, in Cincinnati, to the north side of Eglantine street, in Newport.

At the east side of Eggleston avenue, in Cincinnati, the grade of the railway track was to be seventy-one feet eleven inches above low-water mark, and to ascend thence at the rate of twenty-three and one-quarter feet per mile for a distance of six hundred and forty-one and three tenth
feet to the south side of Front street, where grade was to be
11 seventy-four feet nine inches above low water; thence to ascend at the rate of twenty-three feet per mile for a distance of four hundred and seventy-one and one-third feet to a point thirty feet north of the north end of the channel span, where grade was to be seventy-six feet two inches above low-water mark; thence level over the channel span, the two hundred and twenty feet span, and the pivot span, a distance of nine hundred and forty-five feet. The depth of the superstructure of the bridge being three feet six inches below the grade of the railway, there was seventy-three feet four inches clear headway above low-water mark under each of these three spans, measuring from the lowest point of the bridge. From the south end of the pivot span, the railway grade was to descend at the rate of twelve and three-fourths feet per mile, for a distance of one thousand and eight and one-third feet, to the north side of Taylor street, in Newport, where it was to be seventy-four feet four inches above low water, and the grade of Saratoga and Taylor streets was raised about five feet to conform to the grade of the railway. From the east side of Eggleston avenue to a point seventy-six and two-thirds feet south of Front street, the railway was to be sustained by nine spans of iron bridge on stone piers; the track to pass between the trusses and to be supported by the lower chord of these spans, the length of these spans to be as follows: Span A, over Eggleston avenue, one hundred and one-tenth feet long, with twelve feet clear headway under the bridge, when the avenue should be completed; span B, seventy-six feet long; span C, eighty-four and one-half feet long; span D, seventy-nine and one-fourth feet long; span E, seventy-nine and one-fourth feet long; span F, seventy-nine and one-fourth feet long; span G, seventy-nine and two-thirds feet long; span H, eighty-four and eighth-tenths feet long, over Front street, leaving fifteen and one-half feet clear headway under the bridge, and span I, seventy-six and two-thirds feet long, over the highway which was to cross
the river on the up stream side of the bridge. From this point
12 southward for a distance of ninety-nine and one half feet, the railway was to be supported upon two brick arches and abutments; thence southward to the south side of Front street in Newport the railway and both highways were to be supported by iron bridges, the railway in the center and the highways on the outside, the lengths of the spans being as follows: Span L, ninety-six feet; span M, ninety-six feet; span No. 1, one hundred and thirty-seven and one-third feet; span No. 2 (the channel span), four hundred and eighteen feet; span No. 3, two hundred and thirty-seven feet; span No. 4 (the pivot span), two hundred and sixty feet, leaving a clear opening of one hundred and two and one-half feet at low-water mark upon each side of the pivot pier upon which this span was to revolve; span No. 5, two hundred and two and one-half feet; span No. 6, two hundred and two and one-half feet; span N, forty-four and one-half feet; span O, forty-five feet, and span P, forty-one and two third feet; in all seventeen hundred and eighty and one-half feet between the abutments on the shores of the river. Spans L, M, 1, 2, 3, 4, 5, and 6 were to be supported upon stone piers numbered 1, 2, 3, 4, 5, 6, 7, 8, and 9; and spans N, O, and P upon pier No. 9 at north end of span N. Iron columns on the curb-lines of Front street, Newport, at the ends of span O, and a stone abutment

at south end of span P. To assist vessels passing through the draw span, and to prevent their coming in contact with that span when it should be open, a protecting pier of timber, filled with stones, was to be built above the pivot pier, at proper distance therefrom, to support the end of the draw when open, and the space between this pier and the pivot pier was to be occupied by a large boat or floating guard of sufficient size and strength to allow passing vessels to strike it with great force, and at the same time to prevent the upper parts of the boat from coming in contact with the iron bridge above. From the south side of Front street, Newport, to the north side of Eglantine
13 street, a distance of one hundred and eighty-two and two tenths feet, the railway was supported upon a series of seven brick arches. Over the wagon-way of Eglantine street, a span of fifty-three feet long; thence southward to a distance of one hundred and nine and one-half feet, a series of four brick arches, and thence to Taylor street, the end of the masonry, two parallel retaining walls, with earth filling between them.

The highways beginning at the south side of Front street, Cincinnati, where grade coincided with the established grade of that street, were to ascend southward at the rate of two hundred and ninety-seven and one-half feet per mile, or three degrees and fourteen minutes, for a distance of three hundred and fifty-eight feet to the south end of span No. 1 where the surface of highways was to coincide with the grade of railway; thence southward for a distance of twelve hundred and fifty-four feet to the south end of span No. 6 the grades of railways and highways were to coincide, and thence for a distance of three hundred and fourteen feet the grade of highways to descend at the rate of two hundred and eighty-eight and three-fourths feet per mile, or three degrees and eight minutes, to the north side of Eglantine street, Newport, where the highways end and the grade coincides with the grade of the street. From the south side of Front street, Cincinnati, to the south end of span I of railway bridge, a distance of about seventy feet, the highways were to be sustained by retaining walls of stone, with earth filling between them, the up-stream highway passing under railway span I, as before described; thence southward for a distance of ninety-nine and one-half feet the highways were upon a series of two brick arches parallel to and lower than those supporting the railway, one highway being on each side of the railway; thence southward seventeen hundred and eighty and one-half feet to the south side of Front street, Newport, the highways were carried upon iron girders projecting outside of the trusses of the bridge; thence for a distance of eighty-two and
14 one-half feet each highway was upon a series of three brick arches, parallel to and lower than the railway arches; and thence seventy-eight feet upon retaining walls, with earth filling between them, to the end of highways at the north side of Eglantine street, Newport.

12. It was determined to omit the construction of the permanent bridge from Front street to Eggleston avenue, Cincinnati, until the railroad companies using the bridge should conclude upon plans for depots for their joint accommodation, which, it was proposed, should be built upon the ground on each side of the line of bridge approach between Front and Pearl streets; and wooden trestle work was adopted as a temporary device until the depot plans could be arranged.

13. That contracts were made by the Newport and Cincinnati Bridge Company for the construction and erection of the iron superstructure with the Keystone Bridge Company, of Pittsburg, and for the masonry with G. A. Smith & Co., of Cincinnati, under which the said bridge,

completed as hereintofore described, would have cost as follows: Bridge superstructure, five hundred and sixty-seven thousand and sixteen dollars and ninety-five cents; masonry and foundations, five hundred and twenty-seven thousand seven hundred and forty-nine dollars and eighty-nine cents; embankment in approaches, five hundred and seven dollars; ballast in the same, two thousand one hundred and thirty-five dollars; paving in the same, three thousand four hundred and sixty-nine dollars and forty-four cents, and trestle work in Cincinnati railway approach, nine thousand three hundred and eight dollars and sixty cents; in the aggregate, one million one hundred and ten thousand one hundred and eighty-six dollars and eighty-eight cents.

14. That this complainant, after the adoption of the said plan, prosecuted the work in the construction of the said bridge accordingly, during the years 1869 and 1870, until, on the first day of March, 1871, the masonry was nearly completed, several spans of the superstructure were erected, and work on the other spans in a state of forward-
15 ness, the bridge as it then appeared being shown in the second plan, on Exhibit No. 1.

15. That the work as then done was as follows: The temporary trestle work north of Front street, Cincinnati, was completed.

The masonry for spans at Front street completed.

The retaining walls for highways at same place completed, and filled with embankment, ready for paving.

The brick arches for railways and highways completed.

Piers Nos. 1, 2, and 3 completed.

Pier No. 4, at south end of channel span, complete, except coping, three feet thick.

Pier No. 5 built to within eleven feet nine inches of required height.

Pier No. 6, pivot pier, built to within ten feet nine inches of required height.

Piers Nos. 7, 8, and 9 completed.

The timber pier and float for protecting pivot pier were completed, except that the float was not placed in position. All the masonry for Newport approaches, both railway and highway, was completed, ready for the track of the railway and for the paving of the highways.

Railway spans H and I, at Front street, Cincinnati, were completed, and track was finished from Eggleston avenue to the south front of brick arches on the Ohio shore.

The false works for the erection of spans L and M were in position, and also two-thirds of false works for span No. 1.

Spans Nos. 5 and 6 were erected, with the exception of iron girders for supporting highways, and the false works had been removed and put up on the Ohio shore for the erection of spans L, M, and I.

And at the shops of the Keystone Bridge Company, the proportions of the work done upon the other spans was as follows:

Spans L, M, and No. 1, five-sixths.

16 Span No. 2 (channel span), more than one half.

Span No. 3, seven-eighths.

Span No. 4 (pivot span), turning apparatus provided.

Spans N, O, and P, two-thirds.

Span Q, nine-elevenths.

16. That the actual cost of the whole work done at that time was as follows:

Bridge superstructure, three hundred and twenty-nine thousand three hundred and fifty-four dollars and fifty-nine cents.

Masonry and foundations, four hundred and sixty-seven thousand two hundred and twenty-seven dollars and seventy-two cents.

Ballast in approaches, one thousand and thirty-seven dollars and fifty cents.

Embankment in approaches, five hundred and seven dollars.

Trestle in Cincinnati railway approach, nine thousand three hundred and eight dollars and sixty cents—making in the aggregate the sum of eight hundred and seven thousand four hundred and thirty-five dollars and forty-one cents; and the unfinished portion of said work could have been completed at a cost not exceeding the remainder of the said contract prices as above set forth.

17. That by the fifth section of an act of Congress entitled "An act making appropriations for the service of the Post-Office Department for the year ending June 30, 1872, and for other purposes," approved March 3, 1871, it was enacted that it should be unlawful for the Newport and Cincinnati Bridge Company, the said complainant, or any other company or persons, to proceed in the erection of the said bridge, unless the same should be so constructed that the channel span of four hundred feet, as then located, should have under said span a clear headway, at low water, of one hundred feet below any point of said channel
17 span, and in such case no draw should be required in said bridge; all the other spans of said bridge, which cover the Ohio River at low-water mark, should have a clear headway of not less than seventy feet above low-water mark; and the other spans of said bridge, extending to each shore, might be made of less elevation than seventy feet above low-water mark, to accommodate a regular grade for the approaches to said bridge; and that when the foregoing requirements should have been complied with by this complainant, the location of said bridge, its structure and approaches, should thereupon be deemed to be legalized and declared to be a lawful structure, and should be recognized and known as a post-route; and it was also thereby provided that the plans for changes in said bridge, made necessary by the said act, should be submitted by said company to the Secretary of War for his approval.

18. That thereupon the complainant immediately suspended all further prosecution of the work upon said bridge upon the plan aforesaid; and to conform to the new requirements of the act aforesaid, to utilize, as far as practicable, the work already constructed, and to avoid further questions of damage to property in Cincinnati and Newport, the complainant designed and adopted a new plan for the said bridge, a drawing of which is hereto attached as part hereof, and marked Exhibit No. 2, which plan was submitted to the Secretary of War for his approval, and after examination and report by a board of officers in the engineer corps of the United States army, appointed for that purpose, was, by the Secretary of War, approved, on the 23d day of August, eighteen hundred and seventy-one.

19. That a description of the same is as follows:

The termini of the railway bridge to remain as before. The channel span to be elevated so as to give the required headway for boats passing under it, and the grade of the railway to descend each way
18 from the ends of the channel span, at the rate of two feet in one hundred feet, or one hundred and five and six-tenths feet per mile, to the ends of the bridge.

Beginning at the east side of Eggleston avenue, the grade of the railway track is eighty feet ten inches above low water, and ascends thence at the rate of one hundred and five and six-tenths feet per mile.

for a distance of eleven hundred and forty-five feet, to a point twenty-one feet north of channel span, where grade is one hundred and three feet and eight and one-half inches above low water; thence level for a distance of four hundred and sixty feet, to a point twenty-one feet south of channel span, there being one hundred feet two and one-half inches clear headway, from low-water mark to the lowest part of the channel span; thence the grade descends at the rate of one hundred and five and six-tenths feet per mile, for a distance of fourteen hundred and sixty-one feet, to the north side of Taylor street, where masonry ends, as on the former plan, and grade of track is seventy-four feet and four inches above low water as before.

From Eggleston avenue to Front street, Cincinnati, the railway is upon seven spans of deck bridge, of same lengths as the through bridges intended for former plan. At Front street, a span of through bridge, one hundred and twenty-two and one-fourth feet long, over that street and the up-stream wagon-way of the bridge; thence a series of three brick arches, in all one hundred and thirty-seven and one-fourth feet long; thence through spans L, M, 1, 2, 3, 4, 5, 6, N, O, and P, of same lengths as before, to the abutment at south side of Front street, Newport; thence a series of seven brick arches, same lengths as before, to Eglantine street; through span Q over that street, and thence upon four brick arches and retaining walls, as before, to the end of the bridge, at north side of Taylor street, all the masonry being raised to the newly required height.

The bridge being raised twenty-five feet at the place where the
19 grade of the roadways, ascending from Cincinnati, coincides with the grade of the railway, it became necessary to prolong the highways northward, in order to obtain distance in which to make this additional descent, and instead of beginning to ascend from the south side of Front street, as formerly planned, to remove the beginning of the highways, to a point five hundred and sixty-seven feet north of Front street, and to open a passage thirty-nine feet wide, over private property, on the east side of Butler street, as far north as Pearl street.

From the beginning of the highways, grade ascends at the rate of three hundred and thirty-four feet per mile, or three degrees and thirty-seven minutes, a distance of five hundred and ninety-four feet to the north end of span No. 1, where grades of highways and railways coincide; thence the grades of the three parts of the bridge are upon the same level for a distance of one thousand and fifty feet, over spans 1, 2, 3, and 4; thence grade of highway descends at the rate of two hundred and thirty-nine feet per mile, or two degrees thirty-six minutes, on spans Nos. 5 and 6, a distance of four hundred and seven feet; thence at the rate of two hundred and seventy-five and one-half feet per mile, or three degrees, for a distance of one hundred and thirty-one feet, on spans N, O, and P, and thence at the rate of two hundred and eighty-nine feet per mile, or three degrees eight minutes, for a distance of one hundred and sixty-five feet, to the north side of Eglantine street, Newport, where highways terminate as before, and their grade coincides with established street grade.

From the beginning of the highways in Cincinnati, they are upon embankments, between stone retaining walls, for a distance of one hundred and twenty feet; thence upon two brick arches, a distance of forty-seven feet, to the north side of Front street; thence upon two spans of iron-plate deck bridge, a distance of ninety-six feet; thence upon a series of three brick arches, on each side of the railway arches, a distance of one hundred and thirty-seven and one-fourth feet, to

20 the north end of span L; and thence to the north side of Eglantine street, Newport, they are sustained in the manner described in the former plan.

20. That by the adoption of the said plan, approved by the Secretary of War, the following new work and changes of work previously done were rendered necessary:

Owing to the steep gradient and sharp curvature on the Cincinnati railway approach, it was necessary to construct permanent iron spans between Eggleston avenue and Front street, instead of the temporary wooden trestle, which would have been efficient on the low grade as formerly designed, thus entailing upon the company a loss of the cost of building and removing the trestle, less the value of the materials of which it was made.

The two through spans of railway bridge, already completed at Front street, had to be removed and altered to deck spans, to be used in the approach between that place and Eggleston avenue.

To avoid the obstruction of Butler street, by the prolongation of the highway approach, it was located on ground on the east side of the street, and a new span for the railway over Front street had to be made, long enough to reach a point where the highway, on the up-stream side of the bridge, was entirely clear of the railway; and the increase of the dimensions of this span required that the piers formerly built should be removed, and new piers built of sufficient size to accommodate the new bridge.

The highway approach, south of Front street, had to be removed, and a new approach, as already described, built north of that street.

The brick arches south of Front street had to be torn down and rebuilt twenty-one feet higher than they formerly were, and an additional set of arches built, extending the series northward forty feet.

21 Two additional spans of boiler-plate truss bridge, with four trusses in each span, were required to carry the highway over Front street, and iron columns erected at the south side of the street for the intermediate support of these spans.

Additional ground, thirty-nine feet wide by three hundred and thirty-one feet long, was required and procured on the east side of Butler street, from Front to Pearl street, for the necessary prolongation of the highways.

The pier at the south end of the Cincinnati abutment had to be elevated twenty-three feet eleven inches, which was done by building plum masonry upon that already built.

Pier No. 1 was originally designed for carrying three separate bridges, viz, one for each highway and one for the railway, and was much larger than was required for the new structure. This pier had to be elevated twenty-four and a half feet, and as it was necessary to have the same thickness at the top of the new work as was built for the original plan, the masonry was torn down to the surface of the ground, where the foundation was two feet thicker than the upper part of the pier, and a new pier built on the old foundation, of proper dimensions for sustaining the changed superstructure, the batter of the pier being made one-quarter inch to a foot, instead of one-half inch as formerly.

Piers Nos. 2, 3, 4, 5, and 7 were originally built with angular ice-breakers at up stream ends, and semicircular startings at down-stream ends, up to fifty-one feet ten inches above low-water mark, and thence upward. The piers were of rectangular section, the sides and ends being battered at the rate of one-half inch per foot. Pier No. 2 had to be elevated twenty-five feet and three-quarters of an inch; piers Nos. 3

and 4, each twenty-six and a half feet; pier No. 5, twenty-two feet seven inches; and pier No. 7, seventeen feet four and a half inches;
22 and it was requisite that the tops of the piers at the new heights should be of the same dimensions as they were built under the former plan. To accomplish this, and to preserve the symmetry of the work all the masonry above the tops of the ice-breakers were removed, and new rectangular masonry built from that point up to the required heights, with such batter as would give the proper size at tops of piers.

Pier No. 8 was originally built the same as Nos. 2, 3, 4, 5, and 7; but as the additional height required was comparatively small, being nine feet one and a half inches, the coping only was removed from this pier; new plumb masonry, nine feet one and a half inches high, was built upon the old, and the same coping replaced at the new height.

From pier No. 7 southward, the grade of the highways descends much more rapidly than the grade of the railway. The lower chords of the spans Nos. 5 and 6 are on a level with the grade of the railway, and the highways are supported by iron girders suspended from the lower chords of the spans. At pier No. 8 the difference between grades is five feet two inches, and at pier No. 9 ten feet three inches, for which heights the piers sustaining the trusses had to be reduced to the minimum of length to avoid obstructing the highways; and safety required that cast-iron blocks should be used instead of stone immediately under the points directly subjected to the weight of the spans.

South of Front street, Newport, the stone masonry was raised to the new height by building plumb work on the top of that already built. The arches and retaining walls for highways, from Front street to Eglantine street, were not changed. The railway arches were torn down to the springing lines, the piers built higher, and new arches of the same spans as the old built up to the new grade.

South of Eglantine street, the change of height was small, and was effected by building additional parapet walls upon those already built.

23 In the superstructure south of Front street, Cincinnati, the following changes were requisite:

The false works for the erection of spans L and M and No. 1 had to be removed.

On spans L and M the relative positions of beams for supporting the railway and roadways was changed, and new bracing required. On span No. 1 additional bracing on account of heavy grade. Channel span (No. 2) was not changed.

Span No. 3, additional struts and bracing, on account of the heavy grade. Span No. 4, the substitution of a clear span two hundred and sixty feet long, for the draw span, of same length, but much lighter, as it would have been equivalent to two spans of one hundred and thirty feet each. Spans Nos. 5 and 6, additional struts and brace on account of heavy grade; also suspending the highway girders beneath the trusses, great addition to struts and braces was required to stiffen the highways thus suspended, and additional beams for railway, to replace the girders lowered for highways. These two spans were in place, and the false works had been removed long before the change was ordered. To make them conform to the new plan, the north end of span No. 5 had to be raised seventeen feet four inches, and the south end of span No. 6 ten feet three inches higher than they then were. To do this, it was necessary either to rebuild the false works, and remove the spans altogether, until the masonry was built up to the new height, and then to replace the spans, or to raise them, little by little, upon timber supports at their

extremities, whilst the stone piers were being built up. The latter alternative, being the cheapest, was adopted. The work was performed by erecting timber piers adjacent to the stone piers, under each end of each of the spans; and additional rods were introduced into the spans to transfer the weight from the end posts to the second posts of
24 the spans, while the ends were without support. The north end of span No. 5 was then raised off pier No. 7 by means of powerful hydraulic rams, and the load was transferred to the timber piers by blocks under the second post of the span. It remained supported in this way until pier No. 7 was torn down twenty-five feet, and rebuilt with new batter to the original height, when the process of elevating the spans began. First one end of one span was elevated two feet, by means of the rams, and the weight transferred to the timber pier—one course of stone was laid on the pier at that place, and the bridge lowered to rest upon it; then the other end of the other span was raised two feet, a course of stone laid and the span lowered to rest upon it; then the ends of both spans were raised four feet above the intermediate pier, No. 8, and two courses of stone were laid upon it; and thus by steps equaling the thickness of the courses of stone until the new height had been reached—making it a work of great difficulty, and dangerous both to the structure and to the men employed in raising it.

For spans N, O, and P, at Front street, Newport, additional height of columns was required, and great increase in the struts and bracing, but span Q, over Eglantine street, was not altered.

21. That the actual, necessary, and reasonable cost of making the said additions and alterations was, and is, as follows:

Bridge superstructure, sixty-nine thousand five hundred and ninety-six dollars and fifty-one cents.

Masonry and foundations, one hundred and forty-two thousand seven hundred dollars and fifty-two cents.

Embankment in approaches, six hundred and seventy-five dollars and fifty cents.

Ballast in approaches, one thousand two hundred and eighty-one dollars and twenty cents.

Paving in approaches, four thousand and sixty dollars and eighty cents.

25 Trestle for Cincinnati railway approach cost nine thousand three hundred and eight dollars and sixty cents.

Removing same cost four hundred and ninety-one dollars and eleven cents.

Less amount realized from materials, twenty-five hundred and ten dollars—leaving seven thousand two hundred and eighty-nine dollars and seventy-one cents.

Additional real estate for Cincinnati highway approach, seventy-six thousand two hundred and twelve dollars and seventy-five cents—making an aggregate of three hundred and one thousand eight hundred and seventeen dollars.

And by reason of the delay in the completion of said bridge, unavoidably occasioned by the necessity of making said changes, the cost of said work was increased by the amount of the interest for eight months upon the capital already previously invested in the said work, to wit, on the sum of one million two hundred and twenty-four thousand three hundred and seventy-three dollars and seventy-eight cents, which, at the rate of six per centum per annum, amounts to the sum of forty-eight [illegible] and nine hundred and seventy-four dollars and ninety-five cents.

And the said G. A. Smith & Co., contractors for the masonry in said bridge, allege that, by reason of the changes required in the said plan, the payments to them having been made upon the contract prices fixed by the contract already entered into previous thereto, they have been damaged in the sum of two hundred and six thousand six hundred and fifty-eight dollars and fifty-three cents; the said contract, as they aver, having been broken by this complainant by requiring the work under the same to be performed according to said altered plan, for which sum they have commenced an action against this complainant in the court of common pleas for the county of Hamilton and the State of Ohio, and which sum, in case of their recovery therein, will be an addition to the cost of said structure, caused by said changes—making the whole
26 amount thereof the sum of five hundred and fifty-seven thousand four hundred and fifty dollars and forty eight cents.

22. That, in and by the act of Congress aforesaid, approved March 3, 1871, it was also provided, that, in the event of the complainant making the charges provided for in said act, it should be lawful for the complainant, after it should have made the changes in said bridge and the approaches thereto, as therein provided, to file its bill in equity against the United States, in the circuit court of the United States for the southern district of Ohio, and full jurisdiction was thereby conferred upon said court to determine: first, whether the bridge, according to the plans on which it had progressed, at the passage of said act, had been constructed so as substantially to comply with the provisions of law relating thereto; and second, the liability of the United States, if any there be, to the complainant, by reason of the changes by the said act required to be made; and if this court should determine that the United States is so liable, and that the said bridge was so being built, then the said court should further ascertain and determine the amount of the actual and necessary cost and expenditures reasonably required to be incurred in making the changes in the said bridge and its approaches, as thereby authorized or required, in excess of the cost of building said bridge and approaches according to the plan proposed before the changes required by said act to be made; and the said court was thereby further authorized and required to proceed therein to final decree, as in other cases in equity.

23. That in pursuance of said act of Congress, the complainant now files this bill in equity; and, in addition to the matters hereinbefore set forth, alleges and says, that said bridge, according to the said plan on which it had progressed, at the passage of the said last-mentioned act of Congress, had been constructed so as substantially to comply with the provisions of law relating thereto, to wit, with the provisions
27 of the joint resolution giving the assent of the United States to the construction of the Newport and Cincinnati bridge, approved March 3, 1869, and in accordance with the conditions and limitations of an act entitled "An act to establish certain post-roads," approved July fourteenth, eighteen hundred and sixty-two.

That said bridge, as erected under said plan, had not, at the time the same was required to be altered as aforesaid, substantially and materially obstructed the free navigation of the said river; and that the same, if it had been completed according to said plan, would not have been a substantial and material obstruction to said navigation.

That all the facts respecting said navigation, and affecting the question of the probable amount of obstruction to the same, by the construction of said bridge on said plan, were well known at the time of the passage of said joint resolution, and the said question was not affected by any

facts coming to exist or be known substantially thereto; and that the assent given by said resolution was afterward withdrawn, without any judicial determination that said bridge had become, or was about to become, a substantial and material obstruction to the navigation aforesaid; that, by reason thereof, the United States, according to principles of equity, has become and is liable to the complainant by force of the act aforesaid, approved March 3, 1871, to make good to it the amount of the actual and necessary cost and expenditures reasonably required to be incurred, and which have been incurred, as hereinbefore set forth, in making the changes in the said bridge and its approaches, as by said act were authorized and required, in excess of the cost of building said bridge and approaches according to the said plan purposed before the changes required by the said act to be made.

Wherefore the complainant prays that this honorable court will direct service of a copy of this bill and notice of the filing thereof
28 to be made upon the United States, by its Attorney-General, in the city of Washington, or its attorney in the southern district of Ohio, or other proper officer; and that the court, according to its rules, will proceed to determine the matters of fact and of equity, as by said act of Congress it is authorized to do, and, on final hearing, to decree in favor of the complainant the payment of the amount hereinbefore set forth and mentioned as justly due to it, or such other sum as in equity it may be entitled to, and for such other and further relief as to the court may seem meet and just.

THE NEWPORT & CINCINNATI BRIDGE COMPANY,
By MATTHEWS, RAMSEY & MATTHEWS,

Solicitors.

Southern District of Ohio, ss:

Alfred Gaither, being duly sworn, says he is president of the Newport and Cincinnati Bridge Company, the above-named plaintiff, and that the matters and things set forth in the foregoing bill are true, so far as stated on personal knowledge, and those stated on information and belief he believes to be true.

ALFRED GAITHER.

Sworn to and subscribed before me this 7th day of March, A. D. 1873

[SEAL.] THOS. AMBROSE,
Clerk Circuit Court United States.

31 *Order for appearance.—March* 10, 1873.

Circuit court of the United States, southern district of Ohio. In equity.

THE NEWPORT AND CINCINNATI BRIDGE COMPANY
v.
THE UNITED STATES.

The Newport and Cincinnati Bridge Company now comes by its counsel, and under the authority of the fifth section of the act of Congress, entitled, "An act making appropriations for the service of the Post-Office Department for the year ending June thirtieth, eighteen

hundred and seventy-two, and for other purposes," approved March 3d, 1871, files its bill in equity against the United States of America; and said act providing no mode for service of process in said cause upon said defendant, but full jurisdiction being by said act conferred upon this court to proceed in said cause to final decree, as in other cases in equity, on motion of the complainant, by its counsel, it is now by the court ordered that a copy of the bill and exhibits be served upon the United States attorney for this district, personally; and one upon the Attorney-General of the United States, at the city of Washington, by mail; and that the defendant be required to enter its appearance herein within thirty days from this date. (Journal P, p. 567.)

Clerk's certificate of service.—Filed March 10, 1873.

THE NEWPORT AND CINCINNATI BRIDGE COMPANY
v.
THE UNITED STATES.
} No. 1729. In equity.

The Newport and Cincinnati Bridge Company now comes by its counsel, and under the authority of the fifth section of an act of Con-
32 gress, entitled "An act making appropriations for the service of the Post-Office Department, for the year ending June thirtieth, eighteen hundred and seventy-two, and for other purposes," approved March 3d, 1871, files its bill in equity against the United States of America, and said act providing no mode for service of process in said cause upon said defendant; but full jurisdiction being by said act conferred upon this court, to provide in said case to final decree, as in other cases in equity; on motion of the complainant, by its counsel, it is now by the court ordered that a copy of the bill and exhibits be served upon the United States' attorney for this district, personally, by the clerk of this court, and that the said clerk mail a copy of this order, and of said bill, to the Attorney-General of the United States, at the city of Washington, and that the defendant be required to enter its appearance herein, within thirty days from this date.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, Thomas Ambrose, clerk of the circuit court of the United States within and for said district, hereby certify the foregoing order for appearance to be truly taken and copied from the journal of said court, as the same is kept in this office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Cincinnati, this 7th day of March, A. D. 1873, and in the 97th year of the Independence of the United States of America.

Attest:
[SEAL.]

THOS. AMBROSE,
Clerk Circuit Court United States.

SOUTHERN DISTRICT OF OHIO, *ss:*

I certify that I have this day mailed to Geo. H. Williams, Attorne
General of the United States, at Washington City, D. C., a ce
33 tified copy of within order and of bill and exhibits in case N
1729, Newport & Cincinnati Bridge Co. vs. United States, as r
quired by the said order.

Witness my hand and seal official, this 10th day of March, A. D. 1873.
Attest:
[SEAL.] THOS. AMBROSE,
Clerk Circuit Court United States.

CINCINNATI, *March 10th*, 1873.

Received of Thos. Ambrose, clerk, a certified copy of within order, and of the bill and exhibits therein referred to.

WARNER M. BATEMAN,
United States Attorney, Southern District of Ohio.

Defendant's appearance.—Entered April 28, 1873.

THE NEWPORT AND CINCINNATI BRIDGE COMPANY
v.
THE UNITED STATES.

And now comes the United States of America, by Warner M. Bateman, its attorney, and enters appearance herein in pursuance of the order of court heretofore entered, and moves for leave to file its pleading herein within 20 days, which motion, upon consideration, is granted. (Journal Q, p. 27.)

General Demurrer.—Filed May 13, 1873.

THE NEWPORT AND CINCINNATI BRIDGE COMPANY
v.
THE UNITED STATES OF AMERICA.
Bill in equity.

The defendant, by Warner M. Bateman, its attorney, by protestation, not confessing all or any of the matters and things in the said
34 complainants' bill contained to be true, in such manner and form as the same are therein set forth and alleged, does *demur* to the said bill, and for cause of demurrer shows that the said complainant has not, by its said bill, made such a case as entitles it, in a court of equity, to any relief, nor does said bill contain any matter of equity whereon this court can ground any decree, or give the complainant any relief or assistance as against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant demurs thereto, and prays the judgment of this honorable court, whether it shall be compelled to make any further or other answer to the said bill, and it hereby prays to be dismissed with its costs on this behalf sustained.

WARNER M. BATEMAN,
United States Attorney.

Special demurrer.—Filed May 27, 1874, by leave.

Circuit court of the United States, southern district of Ohio.

THE NEWPORT & CINCINNATI BRIDGE COMPANY
v.
THE UNITED STATES OF AMERICA.
Special demurrer.

The defendant, by Warner M. Bateman, its attorney, comes and *de-*

nies to so much of the bill herein as claims damages, by reason of the alleged breach of the plaintiff's contract with G. A. Smith & Co.

Wherefore, etc.

WARNER M. BATEMAN,
United States Attorney, Southern District of Ohio.

Entry on Demurrers.—May 27, 1874.

United States circuit court.—In chancery.

THE NEWPORT & CINCINNATI BRIDGE COMPANY
v.
THE UNITED STATES. } No. 1729.

35 This cause came on to be heard upon the general demurrer *hereafter* filed by the defendant to the bill for want of equity, and thereupon the defendant had leave to file a special demurrer to so much of said bill as sets forth the claim of the complainant to recover for the alleged liability to G. A. Smith & Co., for damages resulting from the breach of its contract with him, being the last clause to the 21st paragraph of said bill, on page 29 of the printed bill, which was accordingly read, and the same having been argued by counsel, and the court being fully advised in the premises, find that said special demurrer is well taken and do sustain the same, and that the said general demurrer is not well taken, and accordingly the same is overruled.

And leave is given to the complainant to amend the said bill.

And to the defendant to answer the same within days from this date. (Journal Q, p. 305.)

Amended bill in equity.—Filed May 27, 1874, by leave.

Circuit court of United States. In equity.

UNITED STATES OF AMERICA,
Southern district of Ohio, ss:

THE NEWPORT & CINCINNATI BRIDGE COMPANY
v.
THE UNITED STATES.

And now come the complainants, and, by leave of court first had and obtained, amends its said bill by striking out the last clause of the 21st paragraph thereof, beginning with the words "And the said G. A. Smith & Co.," on page 29 of the printed bill, and in lieu thereof inserting the following, to wit:

"That in addition to the foregoing items of moneys actually paid out, there is due from the complainant to the said G. A. Smith & Co., contractors as aforesaid, for the said masonry, on account of work done and materials furnished as a part of the actual and necessary

36 cost and expenditures reasonably required to be incurred in making the changes in the said bridge and its approaches, as required by said act of Congress, in the sum of two hundred and six thousand six hundred and fifty-eight dollars and fifty-three cents, making the whole amount of said cost and expenditures the sum of five hundred and fifty-seven thousand four hundred and fifty dollars and forty-eight

cents; and the same being that much in excess of the cost of building said bridge and approaches according to the plan proposed before the changes required by said act to be done."

Default set aside.—Thursday, November 5, 1874.

NEWPORT AND CINCINNATI BRIDGE COMPANY
v.
THE UNITED STATES OF AMERICA. } Chancery.

Demurrer filed.

By consent of parties it is ordered that the default herein be and the same is hereby set aside, and the defendant has leave to file a demurrer to the amendment of the original bill herein forthwith; and the same is accordingly filed. (Journal Q, p. 378.)

Demurrer to amendment of original bill.—Filed November 5, 1874, *by leave.*

U. S. circuit court, southern district of Ohio.

THE NEWPORT & CINCINNATI BRIDGE COMPANY
v.
THE UNITED STATES. } Demurrer.

And now comes the United States, respondent, by Warner M. Bateman, its attorney, and demurs to the amendment to the complainant's bill, filed May 27, 1874, and for cause thereof alleges:

37 First. That complainant is not entitled to any relief by reason of the matters therein set forth.

Second. That the statements thereof are vague and uncertain in that it does not state the amount and kind of material furnished, and the amount and value of labor performed, and the change in the construction of said bridge that rendered such labor and material necessary; and in that the allegations of said amendment are contradictory of the statements of original bill not amended.

Third. That there are divers other causes of demurrer apparent in the statement of said amendment.

Wherefore respondent demands judgment whether it shall be compelled to make any further or other answer to said amendment, and prays to be hence *to be* dismissed from further suit thereon, etc.

WARNER M. BATEMAN,
Solicitor for Respondent.

Leave to answer.—Saturday, Nov. 7, 1874.

NEWPORT AND CINCINNATI BRIDGE COMPANY
vs.
THE UNITED STATES. } Chancery.

On motion to the court it is ordered that the default herein be, and the same is hereby, set aside, and the defendant has leave to file an answer to the original bill herein, forthwith, and the same is accordingly filed. (Journal Q, p. 382.)

Answer to original bill.—Filed Nov. 7, 1874, by leave.

United States circuit court, southern district of Ohio.

THE NEWPORT AND CINCINNATI BRIDGE COMPANY *vs.* THE UNITED STATES.	Answer to original bill.

38 And now comes the United States of America, respondent, by Warner M. Bateman, its attorney, and files this, its answer to the original bill of complainant, exclusive of the amendment thereto, filed May 27th, 1874, filed herein against it by the Newport and Cincinnati Bridge Company, complainant, and answering thereto, says:

That it is true, as alleged in paragraphs one, two, three, four, and five of complainant's original bill, that complainant is a corporation authorized by and organized under the laws of the States of Ohio and Kentucky; that by those laws complainant was empowered to erect and maintain a bridge across the Ohio River, between the city of Newport, in the State of Kentucky, and the city of Cincinnati, in the State of Ohio; and to enable it to construct such bridge it was authorized by those laws to purchase or condemn and occupy so much land in the bed of the Ohio River, and upon the adjoining shores, as might be required for the piers, approaches, and other necessary works and buildings of complainant, and that said laws also prescribed the manner in which said bridge should be built, as alleged in said original bill.

Respondent, further answering, says, that in pursuance of the authority granted to complainant, as aforesaid, on or about the 9th day of October, 1868, it proceeded to make a contract for the building of said bridge and its approaches, and the other necessary works connected therewith, upon plans and specifications previously prepared by its engineer. That said plan and contract provided for a bridge with a span over the main channel of the river three hundred (300) feet long, and one hundred and three (103) feet high above low-water mark; that said plan was publicly avowed by the agents of said company, and accepted and understood by the public, and especially by the persons and communities immediately interested in the navigation of the Ohio, as the one upon which it was intended to be built by complainant; that work was forthwith begun under said contract for the erection of said bridge upon said plan.

39 Respondent, further answering, says the channel span of the bridge provided for in said plan was too short, and the bridge, if erected in pursuance thereof, would have been a serious and dangerous obstruction to the navigation of the river, and a very great injury to the commerce and business depending upon such navigation. Masters, owners, and pilots of steamboats navigating the river, miners and coal merchants shipping coal upon it, and large portions of the manufacturing and mercantile communities of the cities of Cincinnati, Pittsburgh, Louisville, and other cities and places upon said river, remonstrated against the said contemplated obstruction to its navigation, and applied to Congress at its next session, meeting in December, 1868, to restrain and prohibit it, and to prohibit the construction of any channel span of less than five hundred (500) feet in length. The question and complaints connected with it were referred by the Houses of Congress to committees for investigation, before which the persons and communities aforesaid and complainant were represented. The testimony of witnesses both in be-

half of and against the complainant's said plan of bridge was taken, but the sole subject of controversy throughout such examination, and the consideration of the subject by Congress, was as to the length of said channel span. It was insisted by the class of citizens aforesaid who were remonstrating against the said plan that said bridge should be one hundred and three feet high above low water in the channel span, but the said company by their agent represented and affirmed that the said bridge was to be, and should be, of the height of one hundred and three feet in the said channel span, so that it became and was necessary to interfere with the plan of complainant's bridge only so far as it related to the length of said channel span. With the understanding as to complainant's plan and intention, with respect to the height of its bridge, and relying upon its assurances and representations with respect thereto, the joint resolution referred to in said original bill of
40 March 3d, 1869, was agreed upon and passed by Congress, imposing no other restriction upon the complainant so represented and understood to have been adopted, than as to the length of the said channel span of its bridge.

But respondent further says that forthwith, upon the passage of the said resolution, complainant did, in disregard of its said assurances as to the height intended of said channel span, proceed to change the plans of its bridge from a bridge of unbroken and continuous spans to a drawbridge, and from the height of channel span of one hundred and three feet to the height of seventy feet at low water; which said act was in bad faith and in violation of the understandings and assurances aforesaid. Respondent therefore alleges that so far as the act of March 3d, 1871, relates to the complainant's bridge, it was designed, and such is its effect, to enforce the understanding aforesaid, and to order and compel complainant to do that which in equity and good faith it was before the passage of said act bound to do if it proceeded in the construction of its bridge, and to prevent it from inflicting a great injury upon the public rights in the navigation of the Ohio River.

Respondent, by way of further answer, says that the work upon said bridge in process of construction at the time of the passage of said act of March 3d, 1871, was being done in violation of said joint resolution of March 3d, 1869, in this, to wit:

First. Whereas, by the provisions of the "Act to establish certain post-routes," approved July 14th, 1862, which, by virtue of said joint resolution, is made applicable to the said bridge, and binding upon said complainant, it is required that the piers thereof should be parallel to the current of the river at the place of erecting as near as practicable; yet respondent alleges that the piers of said bridge erected, and in process of erection, on the said 3d day of March, 1871, were placed on a line varying twelve degrees from the line of said current at low
41 water, and ten feet above low water, and varying in a greater degree from the line of the current in high stages of the water. Respondent alleges that it was entirely practicable to have made said piers parallel with said current in any stage of said river, and that the deviation thereof from the line of said current is material and substantial.

Second. Whereas the piers of complainant's bridge being required, as aforesaid, to be parallel with the current of the river, and the provision of said resolution of March 3d, 1869, requiring that the span over the main channel should not be less than four hundred feet in the clear, from pier to pier, it was designed, and such is the effect of said resolution, that there should be provided a channel practical for pur-

poses of navigation of not less than four hundred feet in the clear; yet by constructing its piers at an angle of not less than twelve degrees to the current, it has reduced the channel of the main span practical for purposes of navigation to a width of not exceeding three hundred and ninety (390) feet; and in consequence of constructing the piers of said channel with insufficient foundation, a large amount of riprap became and was necessary to secure and complete the said piers, whereby a further reduction of the width of said channel of not less than forty feet or more would, and must be, made to complete said bridge upon the plan upon which it was being constructed.

Respondent, further answering, says that said bridge, as being erected at the time of the passage of said act, approved March 3d, 1871, complained in said original bill, was, and would have been, a substantial and material obstruction to the navigation of the said river.

Respondent, further answering, denies each and every material allegation of the original bill not herein expressly affirmed or admitted.

Wherefore the United States prays to be hence dismissed
42 with its reasonable costs and charges in this behalf wrongfully sustained.

WARNER M. BATEMAN,
U. S. Attorney and Solicitor.

Demurrer sustained.—Friday, Dec. 11, 1874.

NEWPORT AND CINCINNATI BRIDGE COMPANY
v.
THE UNITED STATES. } In equity.

This day this cause came for hearing upon the demurrer to the amended bill, and was argued by counsel and submitted; on consideration whereof the court find said demurrer to be well taken and sustain the same; and on motion the complainant has leave to amend its bill within ——— days. (Journal Q, p. 440.)

Amendment to bill.—Filed by leave Dec. 15, 1874.

UNITED STATES OF AMERICA.
Southern District of Ohio, ss:

Circuit court of the United States. In equity.

THE NEWPORT AND CINCINNATI BRIDGE COMPANY
v.
THE UNITED STATES.

And now comes the complainant, in pursuance of the leave of the court heretofore had and obtained, and amends its said bill in lieu of the amendment heretofore made on the 6th day of June, 1874, by striking out the last clause of the 21st paragraph of said bill, beginning with the words "And the said G. A. Smith & Co.," on page 29, of the printed bill, and instead thereof inserting the following, to wit:

43 That in addition to the foregoing items there has been incurred an expenditure for the said masonry, on account of work done and materials furnished by the said G. A. Smith & Co., contractors as aforesaid, as a part of the actual and necessary cost and expenditures reasonably required to be incurred in making the changes in the said bridge and its approaches, as required by said act of Congress, the sum of two hundred and six thousand six hundred and fifty-eight dollars

and fifty-three cents, making the whole amount of said cost and expenditures the sum of five hundred and fifty-seven thousand four hundred and fifty dollars and forty-eight cents; and the same being that much in excess of the cost of building said bridge and approaches, according to the plan proposed before the changes required by said act to be done.

And the complainant says, that of said sum of two hundred and six thousand six hundred and forty-eight dollars and fifty-three cents it has paid since the filing of the original bill, and not included in any of the foregoing items, to the said G. A. Smith & Co., the sum of forty-four thousand two hundred and seventeen dollars and fifty-three cents, the remainder of said first mentioned sum being unpaid; and that the liability of the complainant for the same to the said G. A. Smith & Co. arises upon the facts and circumstances following, that is to say:

The complainant having contracted with one George C. Franciscus, of the city of Philadelphia, for the construction of its bridge, according to the original plan, for certain considerations therein set forth, the said Franciscus entered into a contract in writing with the said G. A. Smith & Co., dated on the 9th day of October, 1868, whereby the latter agreed to furnish all the materials and construct the masonry of said bridge at the following rates, to-wit: For limestone masonry, twenty dollars per perch of twenty-five cubic feet; sandstone masonry, eighteen
44 dollars per perch of twenty-five cubic feet as aforesaid; a copy of which contract, and of the specifications attached thereto, is hereto annexed as Exhibit A.

That, afterwards, on the 15th day of April, 1869, said contract was verbally modified; and, as to prices, to the following effect: That the said G. A. Smith & Co. should be paid for said material and labor, as the work progressed, at the rates specified therein, but that on the completion of the same, any increase over said rates the said work should appear to be reasonably worth, under all the circumstances, the said G. A. Smith & Co. should then be paid.

That, afterwards, immediately after the passage of the said act of Congress, approved March 3d, 1871, the complainant, with the assent of the said G. A. Smith & Co. and the administrators of said Franciscus, then deceased, having assumed the obligations and acquired the rights of said Franciscus under said contract with said G. A. Smith & Co., it was agreed between the complainant and the said G. A. Smith & Co. that the said G. A. Smith & Co. should proceed and perform all the masonry of said bridge and all the changes therein required by said act of Congress, and according to the plan thereof as adopted under the same and approved by the Secretary of War, and that they should be paid therefor as the said work progressed, according to the rates specified in said contract, dated on the 9th day of October, 1868, and the verbal modification thereof of April 15th, 1869, so far as the said contract applied, and on the completion thereof should be paid for all said labor and material, according to said modification of said contract of April 15th, 1869, what the same should be fairly and reasonably worth; and the complainant says that payments were made accordingly, and that the whole amount of said payments and of said further sum, remaining unpaid, as heretofore set forth, was the reasonable and fair value of said labor and materials; and under said
45 contracts and agreements due from the complainant to the said G. A. Smith & Co.

THE NEWPORT AND CINCINNATI BRIDGE COMPANY.
By MATTHEWS, RAMSEY & MATTHEWS,
Solicitors.

EXHIBIT A.

This agreement, made and concluded this 9th day of October, 1868, between G. C. Franciscus, of the city of Philadelphia, State of Pennsylvania, of the first part, and George A. Smith & Co., of the city of Cincinnati, State of Ohio, of the second part, witnesseth:

That the said parties of the second part agree to furnish all the materials and construct the masonry of the Newport and Cincinnati bridge, at such point across the Ohio River as may be designated by the engineer of the bridge company, J. H. Linville, or his successor in office, according to the specifications hereto attached, marked A, and to do the work within a reasonable time, and in a workmanlike manner, subject to the inspection and approval of said J. H. Linville, esq., chief engineer, or his successor as aforesaid.

And the parties hereto further agree that all matters of difference arising between them in relation to said work shall be referred to said chief engineer, or his successor, and that his decision and award shall be final and conclusive.

The said party of the first part, in consideration of the foregoing, agrees to furnish yard-room for stone at the bridge site, and to pay said party of the second part as follows: For work done and material furnished—limestone masonry, ($20) twenty dollars per perch of twenty-five (25) cubic feet; sandstone masonry, ($18) eighteen dollars per perch of twenty-five cubic feet, as aforesaid.

Foundations at cost of labor, materials, and superintendence.

46 Said party of the first part further agrees to pay said party of the second part, in monthly estimates, to be made by the chief engineer or his assistant, for work done, material delivered at bridge site, and got out in quarry, at the relative value thereof, retaining ten per cent. until the final completion of the work, and upon the full and faithful completion thereof to pay in full, at rates heretofore specified.

It is mutually agreed and understood that no percentage is to be retained on account of work and material used in foundations.

(Signed) GEO. A. SMITH & CO.
(Signed) G. C. FRANCISCUS.

In presence of—
(Signed) ALFRED GAITHER.
(Signed) W. S. COTTRINGER.

Specifications for masonry, Newport and Cincinnati bridge.

The piers in the channel of the river will be founded on the rock, if rock-bottom can be reached at reasonable depth, otherwise on a hewn timber grillage, or on piles below the level of low water. In foundations above low water the piles will be founded on a bed of concrete, two feet in thickness; the depth to which the foundations of the pier must be sunk and the character and fitness of the foundations will be determined by the engineer in charge of the works.

The masonry must be rock range work; the stones must be accurately squared, jointed and bedded, and laid in courses of not less than twelve inches thick, nor exceeding thirty inches in thickness, regularly decreasing from bottom to top of pier. All face stones are to have a bed equal to once-and-a-half the perpendicular face or rise.

Stretchers shall not be less than five feet in length. Headers shall be long stone not less than five feet in length, and shall hold the

47 size in the heart of the wall that they show in the face, and must be so arranged as to occupy from one-sixth to one-fifth of the entire face, and be similarly disposed in the back of thick walls; when the thickness of the wall will admit of their interlocking, they must be disposed in that manner.

In thicker walls, stones not less than four feet in length will be placed transversely in the heart of the wall, to connect the opposite sides or bond the backing.

The stones used for backing must be well shaped, large stones, of the same thickness usually as the face stones. They must be bedded solidly, without sprawls or underspinning, and scabbled off to secure a good bond with the headers. All interstices between the backing to be filled with chips and loose stones before grouting.

The face stone will be pitched to line at the joints; the faces being left rough as they came from the quarry, unless the projections above the line exceed three inches, in which case they shall be roughly scabbled off to their limit. Each course shall be laid in mortar, composed of one part fresh hydraulic cement, of approved quality, to two parts sharp river sand; and after the backing of each course has been leveled off and filled up, it shall be thoroughly grouted with hydraulic mortar in the above proportions.

The face stone of the two channel piers, and two piers contiguous to the same, shall be limestone of quality to be approved by the engineer. The backing may be sound, strong sandstone.

The other piers and retaining walls of approaches may be built of sound, durable sandstone, or freestone, that will resist the action of frost and the weather.

Limestone facing to be used in all portions of piers and abutments exposed to ice flow.

All the piers will be caped with dress' stone, of thickness not less than eighteen inches on river piers, and twelve inches on land piers.

48 The cut-waters of river piers shall be dressed and fastened together with iron clamps or dowels at the usual level of ice floods and four feet above and below that level.

Caping will also be clamped together with iron clamps.

Proposals for masonry may include all the foundations, masonry of piers, and retaining walls, and all expenses of preparing and sinking foundations.

Proposals may also be made for the masonry, exclusive of the foundations, and sinking or preparing the same.

(Signed) J. H. LINVILLE,
Chief Engineer.

Leave to answer.—Friday, January 8, 1875.

THE NEWPORT AND CINCINNATI BRIDGE COMPANY
v.
THE UNITED STATES. } No. 1729. Chancery.

On motion to the court, it is ordered that the defendant have leave to file an answer to the second amendment to the original bill herein forthwith, and the same is accordingly filed. (Journal Q, p. 475.)

Answer to the second amendment to the original bill.—Filed January 8, 1875.

Southern district of Ohio, circuit court of the United States.

THE NEWPORT AND CINCINNATI BRIDGE COMPANY
v.
THE UNITED STATES.

Answer to the second amendment to the original bill.

And now comes the United States, respondent, by its attorney, and reserving all right and benefit of exceptions that can or may be taken to the insufficiency, imperfections, and errors of said amendment,
49 files this its answer to said second amendment to the complainant's original bill, adopting so much of the answer heretofore filed to the unamended portions of said original bill as may be applicable thereto, and says:

That it is not true that said complainant is indebted to the said G. A. Smith & Co. on account of work and labor done by them upon said bridge, or in making the said changes required by the act of Congress aforesaid, either now or at the time of the making of said amendment, or of the filing of said original bill in the amount alleged in the answer or any other amount.

That said indebtedness, if incurred, would not have been a reasonable or necessary cost and expenditure required to be incurred in making the aforesaid change in said bridge.

And this answering respondent denies each and every other allegation of the said amendment not hereinbefore specifically denied, except as hereinafter expressly admitted.

And this respondent, further answering to the claims alleged in said amendment, says that the said G. A. Smith & Co., on May 29th, 1872, filed their petition in the court of common pleas of Hamilton County, and State of Ohio, against the complainant, in which the said alleged indebtedness of complainant was claimed by said Smith & Co., who alleged in substance in their said petition that on the 9th day of October, 1868, they entered into the contract as set forth in the said amendment for the erection of a bridge, one hundred feet high above low-water mark in the span over the main channel, at Cincinnati, and that they at once proceeded to work under said contract; that in March, 1869, the Bridge Company changed their plans, whereby the height of the channel span was reduced from one hundred feet to about seventy feet above low-water mark, and the approaches to the bridge were greatly reduced in length and heighth, resulting in a large reduction in the amount of labor and material needed, and in the amount of the profitable parts of said contract; that they thereupon notified
50 said Franciscus that they should demand extra compensation on account of said change, which was assented to by him; that after nearly completing said bridge upon said altered plan, the complainant a second time changed it; that they proceeded to again alter and to finish said bridge upon said third plan; that at the time of each change they notified the bridge company of their intention to demand extra compensation on account thereof, to which the bridge company assented; that with the consent of all parties concerned the bridge company assumed the liabilities of said contract in place of said Franciscus and his

representatives, and thereupon the said Smith & Co. claimed in their said petition compensation for limestone masonry under the first change at the rate of thirty dollars ($30) per perch, and sandstone masonry at the rate of twenty-eight dollars ($28) per perch, and compensation for limestone masonry, under the second change, at the rate of thirty-five dollars ($35) per perch, and for sandstone masonry at the rate of twenty dollars ($20) per perch, and for the brick work at the rate of eight 33-100 dollars ($8.33) per perch, and claimed of the bridge company in the aggregate over and above the payments received, a balance of $257,441$\frac{35}{100}$, with interest.

To this petition the said Newport and Cincinnati Bridge Company filed an answer on the 14th day of January, 1873, substantially as follows: That on the 6th day of October, 1868, it made a contract with said Franciscus, of Philadelphia, for the construction of the said bridge across the Ohio River; that although the written contract with Franciscus refers to the plans as annexed thereto, in fact, there were no plans so annexed, nor were any plans, in fact, approved and adopted; that plans had been prepared by their engineers, but that not approving them the said bridge company in November, 1868, ordered new plans to be prepared, which were completed and approved in March, 1869; that the said plans approved and adopted increased instead of diminished the parts of masonry alleged in said petition to be
51 profitable; that Franciscus was not then notified of any demand for extra compensation, nor assented thereto; that on the 3d of April, 1869, Geo. A. Smith sent the following letter to the acting engineer of the bridge company, to wit:

CINCINNATI, *April* 3, 1869.

J. C. WILSON, Esq.,
Engineer of Cincinnati and Newport Bridge Company:

DEAR SIR: After examining the new plans for the masonry of the Newport and Cincinnati bridge, shown me this day, I wish to inform you that I cannot afford to do the work without an increase of compensation over that named in my contract. In the plans upon which I bid there was a much larger amount of masonry in both the river piers and the approaches and no brick-work.

Brick-work has now, to a large extent, been substituted for stone, the stone-work greatly reduced in quantity, and the cutting increased and elaborated, thereby much increasing the cost. The great reduction in the amount and change in the character of the work in the approaches is particularly hard on me, as on this portion of the work I had expected to make my profits; the river work even on the original plan affording no margin at the price at which it was taken.

(Signed) GEO. A. SMITH.

That this letter being forwarded to Franciscus, the parties met personally on the 15th day of April, 1869, and verbally agreed that Smith & Co. should adopt the plans as then adopted by the bridge company as the plans contemplated by the contract, and to furnish the material and labor therefor, at the prices named in said contract, to be paid as therein provided, the said Franciscus furnishing at his expense two engines and as many boats as should be necessary to do the work upon the foundations, and said Wilson, as engineer, assisting Smith & Co. in the matter of the foundations; and that Smith & Co. should lay the brick-
52 work required at the rate of $8.33 per perch; that the ogee course of capitals in the piers should be left out; that coffer dams

should be used instead of caissons, when bottom of caisson would be exposed at low water; that on completion of the work on these terms the question whether under the circumstances Smith & Co. should have any increase over the contract price, and, if so, how much, should be decided by J. Edgar Thompson, and the amount, if any, he should allow should be paid them; but that the contract as to price should otherwise remain unaltered.

That under this agreement Smith & Co. proceeded with the work until February 1, 1871, when it was nearly completed; that in the meantime the bridge company had made divers payments on monthly estimates of the engineer, amounting in the aggregate to $322,700, which included $15,000 advanced them on account of the ten per cent. reserve which, by the contract, the bridge company were entitled to reserve until the completion of the work, and for each payment Smith & Co. gave receipts in full settlement thereof; each of said vouchers specifying the amount and different kinds of work measured and paid for, and the prices at which the same were done as named in said contract, to wit, $20 per perch for limestone, $18 per perch for sandstone, and $8.33 per perch for brick masonry, and expressing that said payments were received in full.

That one Henry C. Spackman was, with the consent and agreement of the bridge company, substituted as a party to the contract with the bridge company in place of the representatives of the said Franciscus, then deceased, by an agreement of February 14th, 1871, which recited that said Franciscus had partially performed his contrac with this defendant for the construction of said bridge, and had received a proportionate part of the consideration therefor, and that Sparkman should fully perform the unfulfilled portion of said contract, and to this substitution Smith & Co. assented, becoming sub contractors for said masonry under said Sparkman, according to the
53 terms of the contract between the bridge company and said Franciscus; that said bridge company had paid to Franciscus and to his administrators after his decease, on account of its said contract with him, the sum of $1,150,000, and on March 8, 1871, paid to said Sparkman the further sum of $50,000 in full settlement of said contract with him and in full payment of all work done under the same

That immediately upon the passage of the act of Congress approved March 3d, 1871, entitled "An act making appropriations for the service of the Post-Office Department for the year ending June 30th, 1872, and for other purposes," and in pursuance of the provisions of the fifth section thereof, all work upon said bridge was suspended, and new plans, according to the provisions of said section, were completed and approved on or about the 23d day of August, 1871.

That on the 22d June, 1871, the bridge company entered into another contract with the said Sparkman, reciting the contract with Franciscus of October 6th, 1868; the substitution of Sparkman in place of Franciscus; that the changes in the bridge required by the act of Congress would add largely to its cost; whereupon it was agreed that in consideration of the agreement of the Pennsylvania Railroad Company to provide money to meet the obligations of Spackman, as they then existed, and to complete the bridge, the money so provided to form an indebtedness of the bridge company to said railroad company, the original contract with Franciscus to which Spackman was substituted, and Spackman liabilities thereon were released and abrogated, and the bridge company assuming all liabilities of Franciscus and Sparkman to

the said railroad company for moneys advanced to him in excess of $1,200,000, and their contracts for real estate, labor, and materials for the use of their said bridge; to which agreement with Spackman, Smith & Co. assented; that the contracts assumed by the bridge company, so far as relates to Smith & Co., was the said contract of October 9,
51 1868, and the modification thereof aforesaid, made April 15th, 1869, and does not embrace any other claims of Smith & Co. against Franciscus and Sparkman, nor any claim for breaches of the said contracts which had occurred prior to said 22d of June, 1871, or for work or labor or materials of any kind outside of said contract and not furnished under it.

That after the passage of said act of March 3, 1871, the bridge company proposed to settle with Smith & Co. for the work and materials furnished to that date, and that they should make new proposals for the additional work and materials required to complete the bridge according to the provisions of said act; that Smith & Co. declined to do this, but elected to go on with the work at the rates prescribed by the said contract of the 9th of October, 1868, and the supplement thereto of April 15th, 1869, without other compensation, to which the bridge company assented.

That the change of plan required by the act of Congress involved the taking down of the brick-work in the approaches on both sides of the river, which on the Ohio side was done by the bridge company, and on the Kentucky side by Smith & Co., who were fully paid for the same; that so much of the stone masonry as was required to be taken down and recut was sold to Smith & Co., as it stood in the piers, at $6 per perch for limestone, and $3 per perch for sandstone from the rectangular piers, and $1 for stone in the pivot pier, having been already once paid for at full contract prices, and for which Smith & Co. were allowed a second time at full contract prices, thus more than compensating them for taking down, recutting and resetting the stone; that Smith & Co. were entitled to $360 for extra doweling of eighteen courses of masonry.

That in all respects the masonry required by the altered plan was the same as required by the original specifications and corresponded with that with which the bridge had already been built, except as hereafter stated; that Smith & Co. had laid 5,858 perches of sandstone
55 masonry, 8,674 perches of limestone masonry, and 5,465 perches of brick masonry, and 1,314 perches of stone spandrils, being an increase of 20 per cent. of sandstone and a decrease of 24 per cent. of limestone over the estimates for the projected plan of October, 1868; that Smith & Co. laid, under the altered plan of 1871, $2,276\frac{75}{100}$ perches of limestone, amounting, at $20 per perch, to $45,535\frac{10}{100}$; $5,303\frac{44}{100}$ perches of sandstone, amounting, at $18 per perch, to $95,161\frac{92}{100}$; $3,395\frac{63}{100}$ perches of brick masonry, amounting, at $8\frac{25}{100}$ per perch, to $28,013\frac{92}{100}$; and 1,314 perches of stone spandrils, at $8\frac{25}{100}$, amounting to $10,840\frac{50}{100}$; that the value of the entire work done by Smith & Co. under their contracts is $514,695\frac{53}{100}$, on account of which they have been paid $475,200.

That Smith & Co. are not entitled to charge anything for laying the foundation of the piers; that that work was not done under their care and supervision; that all they did was to pay the monthly rolls and bills by purchasing agents, occupying not exceeding 31 days, which at $10 per day would make $340, which with one month's interest on moneys advanced on those rolls and bills would make an aggregate of $627\frac{72}{100}$; but that the bridge company denies that they are entitled to anything

the said railroad company for moneys advanced to him in excess of $1,209,000, and their contracts for real estate, labor, and materials for the use of their said bridge; to which agreement with Spackman, Smith & Co. assented; that the contracts assumed by the bridge company, so far as relates to Smith & Co., was the said contract of October 9,
54 1868, and the modification thereof aforesaid, made April 15th, 1869, and does not embrace any other claims of Smith & Co. against Franciscus and Sparkman, nor any claim for breaches of the said contracts which had occurred prior to said 22d of June, 1871, or for work or labor or materials of any kind outside of said contract and not furnished under it.

That after the passage of said act of March 3, 1871, the bridge company proposed to settle with Smith & Co. for the work and materials furnished to that date, and that they should make new proposals for the additional work and materials required to complete the bridge according to the provisions of said act; that Smith & Co. declined to do this, but elected to go on with the work at the rates prescribed by the said contract of the 9th of October, 1868, and the supplement thereto of April 15th, 1869, without other compensation, to which the bridge company assented.

That the change of plan required by the act of Congress involved the taking down of the brick-work in the approaches on both sides of the river, which on the Ohio side was done by the bridge company, and on the Kentucky side by Smith & Co., who were fully paid for the same; that so much of the stone masonry as was required to be taken down and recut was sold to Smith & Co., as it stood in the piers, at $6 per perch for limestone, and $3 per perch for sandstone from the rectangular piers, and $4 for stone in the pivot pier, having been already once paid for at full contract prices, and for which Smith & Co. were allowed a second time at full contract prices, thus more than compensating them for taking down, recutting and resetting the stone; that Smith & Co. were entitled to $360 for extra doweling of eighteen courses of masonry.

That in all respects the masonry required by the altered plan was the same as required by the original specifications and corresponded with that with which the bridge had already been built, except as hereafter stated; that Smith & Co. had laid 5,858 perches [illegible] one
55 masonry, 8,674 perches of limestone masonry, and [illegible] ches of brick masonry, and 1,314 perches of stone spandrils, being an increase of 20 per cent. of sandstone and a decrease of 24 per cent. of limestone over the estimates for the projected plan of October, 1868; that Smith & Co. laid, under the altered plan of 1871, $2{,}276\frac{37}{100}$ perches of limestone, amounting, at $20 per perch, to $\$45{,}533\frac{40}{100}$; $5{,}363\frac{14}{100}$ perches of sandstone, amounting, at $18 per perch, to $\$95{,}461\frac{52}{100}$; $3{,}395\frac{63}{100}$ perches of brick masonry, amounting, at $\$8\frac{25}{100}$ per perch, to $\$28{,}013\frac{25}{100}$; and 1,314 perches of stone spandrils, at $\$8\frac{25}{100}$, amounting to $\$10{,}840\frac{50}{100}$; that the value of the entire work done by Smith & Co. under their contracts is $\$514{,}695\frac{73}{100}$, on account of which they have been paid $475,200.

That Smith & Co. are not entitled to charge anything for laying the foundation of the piers; that that work was not done under their care and supervision; that all they did was to pay the monthly rolls and bills by purchasing agents, occupying not exceeding 31 days, which at $10 per day would make $340, which with one month's interest on moneys advanced on those rolls and bills would make an aggregate of $\$627\frac{73}{100}$; but that the bridge company denies that they are entitled to anything

on account thereof, but it admits that there is a balance due Smith & Co., $988.37, upon advances made by them on the cost of said foundations.

That the total extra cost of night work done on the bridge by Smith & Co. was not more than 951.67 and of Sunday work was not more than $2,288.98.

That there is owing to Smith & Co. for extra work, as follows:

1. Extra coping, and roller guide to draw pier	$1,920
2. Twelve pedestals for lamp posts	1,600
3. 214 perches askew backs and caps on piers	1,070
4. 705 perches of masonry rebuilt—piers 6x6	2,525

That the account between Smith & Co. and the bridge company is as follows:

56	Amount due for masonry at central pier	$514,695 83
	Balance on foundation	988 37
		$515,684 20
	Payment on same	475,200 00
		40,484 20
	Allowances for disbursements on pay-rolls, etc., night-work, Sunday and extra work	10,298 27
	Total balance	$50,782 47

Which, with interest from beginning of suit, was due from bridge company to Smith & Co.; that beyond this the bridge company denied all indebtedness to Smith & Co.

Alfred Gaither, as president of the said bridge company, made affidavit to the allegations of said answer.

Respondent further answering says that subsequently, on the 18th day of April, 1873, in pursuance of the provision of the code of procedure in Ohio, judgment was rendered by said court in said cause in favor of said Smith & Co. for so much of their said claim as was admitted, as aforesaid, against the said bridge company, including interest thereon, without prejudice to the right of Smith & Co. to further prosecute said cause as to the balance of their said claim amounting to the sum of two hundred and six thousand six hundred and forty-eight 75/100 dollars, as to which balance the said bridge company, in their said answer, denies all liability whatever.

This respondent, further answering says that the said claim so disputed by the said bridge company in the said suit by Smith & Co. against it, is the same claim referred to and alleged to exist and be owing by it to Smith & Co. in the said second amendment to its original bill herein against this respondent.

Respondent, further answering, says that on or about the [illegible] day of June, 1873, and previous to the filing of the amended petition herein, in said original bill, the said bridge company and said Smith & Co. made a contract for the settlement of said suit and the matters in controversy therein, of the substance and effect as follows:

The said bridge company agreed to pay to the said Smith & Co. the sum of [illegible] thousand dollars, of which fifty thousand seven hundred and eighty-two [illegible] dollars was to be applied in satisfaction of the amount admitted to be due by the bridge company to Smith & Co. as aforesaid, for which judgment was taken in said suit, and the balance of forty-four thousand two hundred and seventeen 53/100 was to be applied

upon the disputed portion of said claim, to wit, two hundred and six thousand six hundred and fifty-eight $\frac{53}{100}$ dollars, and to prosecute their suit herein against the United States for the whole amount of said disputed claim for the use and benefit of said Smith & Co. to the extent of any excess in the amount they might recover thereon over and above the said sum of $44,217.\frac{53}{100}$, which excess should belong to the said Smith & Co., and they should be entitled to have and receive the same; and that the said sum of $95,000 paid as aforesaid, and any excess recovered as aforesaid, of the United States for their use should be in full satisfaction of all claims of said Smith & Co. against the said bridge company, and that if from any cause nothing should be recovered upon said disputed claim in excess of the said amount so paid thereon, the said payment should be, and was, in full satisfaction of all claims of the said Smith & Co. against the said bridge company; and thereupon it was further agreed that the said suit of the said Smith & Co. against the said bridge company should be dismissed, each party paying its own costs.

In pursuance of this contract the said bridge company paid to said Smith & Co., at the time of the execution thereof, the said sum of
58 ninety-five thousand dollars ($95,000), for which the said Smith & Co. gave their receipt, appended to the contract, in words and figures as follows, to wit:

CINCINNATI, *July* 19, 1873.

We hereby acknowledge the receipt from the Newport and Cincinnati Bridge Company, by A. Gaither, president, the sum of ninety-five thousand dollars, in the full payment of the consideration of the foregoing contract.

GEO. A. SMITH & CO.

By virtue of said agreement and in consideration of the payment of said sum of ninety-five thousand dollars ($95,000), the said bridge company became and was discharged of all claims of the said Smith & Co. on account of work and materials furnished in making the changes in said bridge as required by the said act of Congress.

Respondent further avers that the whole of said claim set forth and described in said second amendment to said original bill is prosecuted for the use and benefit of said G. A. Smith & Co., to whom the United States is not liable under the provision of the said act of March 3, 1871, or otherwise, and is not prosecuted on account and for the use of the said bridge company as for the cost and expenditure by it made and incurred in making the said changes in said bridge, except it may be to the extent of the payment thereon of the said $44,217.53.

And respondent having fully answered to the said second amendment of said original bill prays to be herein dismissed with its costs, etc.

WARNER M. BATEMAN,
United States Attorney.

59 *Replication.*

In the circuit court of the United States for the sixth judicial circuit.

THE NEWPORT AND CINCINNATI BRIDGE COMPANY, plaintiff,
v.
THE UNITED STATES, DEFENDANT. } Replication.

And now comes the complainant, and saving and reserving to itself

1874, Nov. 5.—Demurrer to amended bill filed.
1874, Nov. 7.—Leave to file answer (Q. 382).
1874, Nov. 7.—Answer to original bill filed.
1874, Dec. 11.—Demurrer sustained and leave to amend bill in 10 days (Q. 440).
1874, Dec. 17.—Amendment to bill filed.
1875, Jan'y 6.—Leave to answer (Q. 475).
1875, Jan'y 8.—Answer to 24 amendment to bill filed.
1875, Feb'y 1.—Replication filed.
1875, May 11.—Lawrence Maxwell, of Cincinnati, appointed examiner (Q. 558).
1875, Aug. 11.—Depositions of J. H. Linville and two others filed for complainant. $75.00.
1875, Sept. 1.—Deposition of John C. Wilson filed for complainant. $50.00.
1876, Jan'y 15.—Deposition of Richard C. Gray for defendant filed. $7.
1876, March 3.—Deposition of Gen. A. Smith for complainant filed. $50.
1876, March 8.—Deposition of Wm. E. Merrill and others for respondent filed.

DEPOSITIONS.

Circuit court of the United States, southern district of Ohio.

THE NEWPORT AND CINCINNATI BRIDGE CO. }
vs. } 1729.
THE UNITED STATES GOVERNMENT.

Testimony taken by me, the undersigned, Lawrence Maxwell, jr., duly appointed and confirmed by the court special examiner in this cause, to be read in evidence on the hearing of the same; taken at the office of Matthews, Ramsey & Matthews, at the city of Cincinnati, in the said district; begun on Monday, May 17th, 1875, pursuant to notice duly given to counsel for complainant and defendant, and continued from day to day as herein noted.

Present as counsel for the complainant Stanley Matthews, esq., and for the defendant Warner E. Brennan, U. S. atty.

The counsel for the complainant produces and offers in evidence the statute of the State of Kentucky entitled "An act to incorporate the Newport and Cincinnati Bridge Company," approved February 5th, 1846. Also, the statute of Kentucky entitled "An act to amend the charter of the Newport and Cincinnati Bridge Company," approved February 26th, 1849. Also, the certificate of incorporation of the Newport and Cincinnati Bridge Company, under and by virtue of an act of the legislature of the State of Ohio, passed April 5th, 1865, entitled "An act supplementary to an act entitled 'An act to provide for the creation and regulation of incorporated companies in the State of Ohio,'" passed May 1st, 1852. Also, the agreement of consolidation between the Newport and Cincinnati Bridge Company, a corporation chartered in the State of Kentucky, and the Newport and Cincinnati Bridge Company, a corporation organized under the laws of the State of Ohio. All the foregoing being contained in the printed pamphlet hereto attached, and made part hereof by consent of counsel, formal proof thereof being waived.

Exs. 1[illegible]—1

work, by preparing stone for the bridge and work at the bridge site was commenced on May, 1888.

Q. 30. State by whom that work was done.

A. 30. The Lovejoy L. Pratt & Co.

Q. 31. State whether it was done under a contract in writing.

A. 31. It was done under a contract dated October 9th, 1888, providing for the construction of the stone masonry, and a subsequent contract dated April 17th, 1889, for the construction of brick work.

Q. 32. Look at Exhibit A attached to the amendment of the complainant's bill, and state whether or not the exhibit is a copy of the contract of October 9th, 1888.

(Objected to by defendant, See C. R.)

A. 32. I have looked at Exhibit A and believe it to be a true copy of the contract.

Q. 33. State something in what plan the work on said bridge which was provided prior to the passage of the act of Congress approved March 3, 1891, was done.

A. 33. It was done upon the plan shown on Exhibit No. 1, upper drawing, attached to the bill.

Q. 34. State who made the drawing from which that exhibit was copied.

A. 34. It was compiled by me from various drawings of details made by U. S. assistant chief engineer.

Q. 35. State whether the work, prior to March, 1891, so far as it was executed, was done in conformity with the plan exhibited in that drawing.

A. 35. It was.

Q. 36. State what was the elevation above low water mark over the channel of the river corresponding to the bottom chord of the bridge, at said bridge.

A. 36. About 22 feet.

Q. 37. What was the dimension of the span over the main channel of the river?

A. 37. It was a rectangular space, 474 feet in length from center to center of the piers on which it rested.

Q. 38. How many feet wide is the river from pier to pier?

A. 38. About 400 feet, between the ends there of masonry, at low water mark.

Q. 39. Would the width be greater or less than that in the river between the piers at higher stages of water?

A. 39. The extension of the lines of the piers being 2 feet to each bay of piers, the distance between masonry was increased at the rate of one half the width bay of one of the widths of the water.

Q. 40. State what had been done preliminary with reference to the main channel of the river at that point.

A. 40. It was excavated over the main channel of the river as covered and to several depths, about.

Q. 41. State how or what means you adopted to ascertain the exact situation and course of the main channel of the river at that point.

A. 41. Borings were commenced and to me ascertaining the main channel of the river, which borings had been placed there by Mr. A. M. Perry, then president of the bridge co., in presence of and with the approval of a number of disinterested pilots, and the piers for supporting the main span of the bridge were located by me in accordance with the position of those borings.

Q. 41. Were those drawings upon the same plan as the side elevation that you had when you entered upon your office, and to which you have referred?

A. 41. They were not.

Q. 42. In what respect did they differ?

A. 42. To my memory serves me, the drawings I had were for a bridge to commence at Third and Butler streets, Cincinnati, and to cross thence in a straight line to a point in Saratoga street, Newport, some two or three squares south of the present terminus of the bridge, the grade of the bridge being ninety or one hundred feet above low water, and the channel span placed at, or near the center of the river. The plans were to use some for a bridge beginning at Eggleston avenue, Cincinnati, between First and Pearl streets, extending thence by a curved line to the river bank at the foot of Butler street, and thence by a straight line to the present terminus of the bridge in the city of Newport; elevation of the channel span being seventy-three feet from ordinary low water, located at the point designated as the channel of the river in government plats. Southward from the channel span there was a span of 220 feet clear, and south of that span a river or shore span of two openings of 180 feet each, as is shown by Exhibit No. 1, attached to the bill, and as fully described in paragraph No. 12.

Q. 43. Did the original plan you refer to provide for a draw span such as you describe or a pair of second plans on which you finally proceeded in your work?

A. 43. I do not think it did. This plan was merely preliminary, was not given out to work from, and I paid little attention to it.

Q. 44. Upon what plan were the estimates ever submitted to the company made, if you know?

A. 44. I do not know.

Adjourned by agreement of counsel until Tuesday, May 14th, at 9 o'clock A. M.

13 Pursuant to adjournment, the taking of this testimony was continued on Tuesday, May 14th, at 9 o'clock A. M., at the office of Matthews, Hinkle & Matthews. Present the same counsel.

JOHN C. WILSON, a witness, in continuation of his testimony, upon interrogatories, replied to interrogatories as follows:

Q. 45. When did they begin delivering stone and other material at the site of the bridge?

A. 45. In March or April, 1889.

Q. 46. Was it at that time already projected for the bridge when delivered, and was the preparation of it at the quarries or elsewhere under the advice or direction of any engineer?

A. 46. The stone delivered at that time were brought from the Portsmouth quarries. No work had been done upon them except quarrying them and the little dressing which was required to fit them for the work was done at the bridge site. The timber delivered at the time was as it came from the mills and was worked into cofferdams and other things for which it was intended at or near the bridge site. At the same time large quantities of limestone had been cut at the quarries at North Vernon, Indiana, for the pier arches, suitable for any masonry having the same bottle as that used for the piers, but not adapted to any special part of the work. All of this work was done under my direction.

the general impression that the low bridge plan with pivot span had been adopted.

Last clause of answer which brackets objected to by U. S. counsel:

Q. 79. Under whose direction did you act, and to whom did you give your orders in the preparation of material mentioned in Words, 1907?

A. 79. I acted under the direction of J. H. Linville, chief engineer, and of George A. Hoadley, agent for the U. S. Government. I gave my orders to George A. Smith, of the firm of George A. Smith & Co., contractors for the masonry of the bridge.

Q. 80. Previous to the time of beginning the preparation of materials in December, 1906, to which you have referred, had you communicated with Linville or Roberts as to the description of a bridge you should have the material prepared for? If so, what was it? Had you got the plan of the 90-ft. low bridge to which you have referred, where, and in whose possession was it?

A. 80. At some time previous to the order issued by me for the preparation of stone I was informed by Mr. Linville or Mr. Roberts that the center of the piers would be one-half each way, and I was directed to proceed with the preparation of stone of that basis. I saw the plan referred to in the office of J. H. Linville in Philadelphia, in September, 1905. It was shown to me by Mr. Linville, who told me it had been prepared from notes taken in Norwood, Mr. Jobe, on the line of Eggleston avenue, Cincinnati, and East Row street, Newport, that these notes were unsatisfactory, and that he desired me to proceed to Cincinnati and make surveys and soundings for a bridge from Butler street, Cincinnati, to Saratoga street, Newport.

Q. 81. At the time these directions were given, did they include any direction for preparation of material for a pivot pier, and was there any reference there made to the establishment of such pier?

A. 81. No directions were given me concerning the preparation of material for pivot pier, nor was reference made to a pivot pier.

Q. 82. At what time in the progress of the work did you first receive instructions as to the construction of a pivot pier?

A. 82. I received the plans in March, 1908, with instructions to proceed to build the bridge in accordance with those plans as rapidly as possible. I do not know that I at any time received special instructions as to the pivot pier. The inspection of the plans was the first notice I had that a pivot pier would be required.

Q. 83. What the character of which you have referred to, with reference to the size of the bridge, where, so far as it might necessarily be affected by the erection? That is not referred to in this answer.

A. 83. I presume by inquiries in regard the piers made by me. My survey was made to obtain the relative position of the piers in the river and Newport harbor, especially Third street and the Licking River, street and the Cincinnati, New Orleans & Texas Pacific Railroad depot in Cincinnati, and at Saratoga street, to locate my soundings with those on the line in the city of Newport, to ascertain the deepest water, nearest to the channel, and the character of the bottom of the river between Butler street, Cincinnati, and Saratoga street, Newport. I do not know whether this survey had any relation to the plan of the bridge between the abutments and the position of the channel span. This survey was made in the latter part of September and the month of October, 1906.

Q. 84. When was it completed in October, 1906, and where is it now known, are the drawings of that survey?

A. 42. I do not remember the exact date, but it was near the end of the month. The map prepared by me was delivered to J. M. Linville, chief eng. I do not know who now has it.

Q. 43. Were you connected with or present at the making, or the negotiations resulting in the contract with C. A. Smith & Co.?

A. 43. I was not.

Q. 44. Were you present at any meeting of the officers, or such persons having the direction or charge of construction of the bridge, at which the plan of bridge as communicated to you in March, 1869, was adopted; or did you know of any meeting of the officers of the company shortly previous to that time, held here or elsewhere, with a view to discuss or adopt or change the plan of bridge?

A. 44. I was in Cincinnati in November, 1868, present at a meeting of various railway officials who had come here, I believe, for the purpose of examining the proposed bridge site and of determining the plan of bridge to be adopted. There was present at the meeting, J. Edgar Thompson, Thos. A. Scott, Gen. B. Roberts, Wm. J. Howard, president, vice-president, assistant president and general solicitor of the Pennsylvania R. R. Co.; I think Mr. Linville and also Mr. Jervis Bright, a then president of the Little Miami R. R. Co.; but I am not sure about these latter two.

Q. 45. If on the bridge marked in pursuance to the survey which you made, and the direction of the piers with relation to the courses of the current, as indicated on your map or survey?

A. 45. The bridge was located upon the line and there upon my map, and the piers were placed at right angles with the axis of the bridge. The direction of the current in the channel was, according to my observation, about five degrees east of the direction of the piers.

Q. 47. How did you ascertain the course of the current; and if from observations of your own, how often and when were they taken?

A. 47. The direction of the current in the channel was ascertained by me from observations taken from a boat anchored above the axis of the bridge of the direction taken by blocks of wood placed in the river from the boat and allowed to float with the current. These observations were made during a portion of one day in October, 1868. I do not remember the number of observations taken.

Q. 48. Can you state the stage of water at that time?

A. 48. I think the stage of water at that time was between fifteen and twenty feet above low water mark by the rules of the water works. These observations were taken in the main channel.

Q. 49. How did you ascertain the main channel of the river?

A. 49. Buoys were placed designating the channel as pointed out by a number of prominent pilots brought together for that purpose by Mr. A. A. Dorr, vice-president of the Bridge Co. The position of these buoys was presented to me, and the channel noted from my map in accordance therewith.

Q. 50. Did you not then yourself make any actual measurement of the depths of the channel?

A. 50. I did make soundings at intervals to about three hundred feet across the river at that point.

Q. 51. For what purpose?

A. 51. In order to make the correct cross section of the bed of the river and to determine what depths of water would be encountered in the construction of the piers.

Q. 52. Were the points of measurement there at the place so they were located?

A. 92. I do not remember whether the petals at which soundings were then taken coincided with those at which the piers were subsequently located.

Q. 93. Did you make a profile of the construction of the river as ascertained by these soundings? If so, what becomes of it, and where is it now?

A. 93. I did make such profile; delivered it to Mr. Linville, and suppose it to be still in his possession.

Q. 94. Were the foundations of the piers made under your direction, and, if so, at what level and with what material were the piers of the channel-span begun?

A. 94. The foundations of the piers were laid under my direction. The piers of channel-span were founded upon grillage or platforms of timber three feet in thickness. The tops of these platforms were placed two or three feet below the bed of the river at the side of the piers. I do not now recollect their exact depth below low-water mark.

Q. 95. Upon what foundation was the grillage placed?

A. 95. At the pier at the north end of the channel-span the grillage was placed upon clay and limestone; that at the south end of the channel-span upon coarse gravel.

Q. 96. Was not the level at which the grillage was placed in these two piers above the lowest points of the channel-bed much less?

A. 96. The tops of the grillages may have been above the lowest point of the river bed between them, but I do not think the bottoms of them were.

Q. 97. Would not the effect of the construction of the piers upon the current be to increase its velocity and rapidity between them?

A. 97. The construction of the water was caused by the presence of piers or other obstructions in the free passage of the stream has a tendency to increase the rapidity of the current at such points, but in this case I have never noticed any such effect produced by the presence of the piers.

Q. 98. Do you regard the foundations of such piers as you have described them to be secure against the washings of the current without the use of the rip-rap?

A. 98. I would not regard foundations such as these as entirely safe without having protected by rip-rap.

Q. 99. Have such other three piers been begun or finished since you added to their foundations, and under whose advice or direction was such addition made?

A. 99. The foundations of three piers were constructed during the summer of 1873, and the piers built upon them during the same year. The pier at the northern end of the channel-span being entirely finished, and that at the southern end of the same span partially so. Under the direction of Mr. C. P. Roberts, engineer who placed there from the town during the summer and autumn of 1873.

Q. 100. What did he order it?

A. 100. I suppose he gave the directions in order to protect the foundations against the scouring action of the water.

Q. 101. Did you measure the distances between the piers of the channel-span after they were constructed, and if so, at what stage of water and at what previous dates did you ascertain the space to be open?

A. 101. I did not make such measurement after the piers were built.

Q. 102. What relation does the bottom chord of the bridge bear to the lowest part of the structure?

Q. 122. In these sums included, as a part of the sums you have stated to have been paid to C. L. Smith & Co.?

A. 122. A large portion of the cost of boarding was paid to them, C. L. Smith & Co., for labor and materials furnished to them. The balance of the cost was paid to me for materials, tools and machinery used for their construction. The amounts so paid to me did not enter into the account of C. L. Smith & Co. This answer applies to the boarding of all the years.

Q. 123. What becomes of the machinery used in the construction of the foundations for the bridge and the other parts thereof, and was the cost of such machinery included in the amount which you say the bridge cost in your answer 20?

A. 123. The tools, plant, etc. included by me in the term machinery, were for the most part worn out or lost. The cost of machinery, engines and pumps was distributed over the costs of the various foundations of piers and pier cells in proportion to the amounts expended upon them. Some of the machinery was sold before the completion of the work, and the proceeds were credited to foundation account. Other tools were purchased, their cost was charged to foundation account and distributed in the same way as the cost of machinery. The amount realized from their sale was credited to foundation account in the same way as above stated. These expenditures, so far as they had been made up to March 1st, 1872, are included in the amounts mentioned in my answer to Q. 20.

Q. 124. In the amount credited from time to time was credited in the way stated in your answer 20?

A. 124. The amount stated to have been so credited in the way stated in your answer 20?

A. 124. The amount stated to have been so credited from time to time for the foundations of that class to the various sums stated to foundations March 1st, 1872. All amounts credited from sales of machinery, tools or machinery, which had been formerly charged to foundation account, having been duly credited and deducted.

Q. 125. Have you books of account kept, or vouchers made and preserved of the expenditures made in the construction of the bridge? If so, where are they, or where kept, and explain the nature of vouchers in which these accounts were made up, and how exactly they have been kept and preserved?

A. 125. The principal accounts connected with the construction of the bridge were kept by me at my office in Cincinnati. Vouchers were taken for all moneys expended. These books and vouchers are now in custody of Gen. C. Ludlow, chief engineer of the Bridge Company, from whom I received possession from time to time as required during the construction of the work, and to whom I surrendered on monthly statements of expenditures accompanied by vouchers showing to whom the money was paid for what it was paid, and to what account it was charged.

Q. 126. What became of the principal men employed with you in the work relating to the bridge mentioned in the act of Congress?

A. 126. The principal and superintending mechanics were kept busy and retained, the rest is answered by the same being $[illegible] dollars thousand and seventy-six dollars and sixty-three cents. The foundation eight hundred and twelve (812) perches of stone were used in Q. 1. Smith & Co. a total cost dollars and parts, and used in them in the construction of other parts of the bridge. Five hundred (500) perches were used as riprap for the foundations of the piers, and the remainder were scattered about the bottom in the bottom of the river, there being no use about the bridge for them, and being an

[illegible]

Newport and Cincinnati Bridge Company; and said amendatory act further provides that it shall be lawful for said bridge company to become merged into a new corporation with any bridge company organized under the laws of the State of Ohio to build a bridge across the Ohio River, by the presidents and directors of the several companies entering into a joint agreement, under the corporate seal of each company, for the consolidation of said companies, and prescribing the terms thereof, the mode of carrying the same into effect, the name of the new corporation, the number of shares of the capital stock, the amount of each share, and other matters in said amendatory act set forth, which agreement said amendatory act requires to be submitted at separate meetings of the stockholders of said companies for their adoption.

And said amendatory act declares that upon the making and perfecting of said agreement and filing the same, or a copy thereof, with the secretary of state of said State of Kentucky, the several corporations, parties thereto, shall be deemed and taken to be one corporation, possessing within said State all the rights, privileges, and franchises, and subject to all the restrictions, disabilities, and duties of said Newport and Cincinnati Bridge Company under said charter and said amendment thereof; and whereas an act of the general assembly of the State of Ohio, passed April 3rd, 1858, entitled "An act supplementary to an act entitled 'An act to provide for the creation and regulation of incorporated companies in the State of Ohio, passed May 1st, 1852,'" authorizes the organization of companies in the State of Ohio for the construction of bridges across the Ohio River, and declares that when its conditions have been complied with, the persons forming such company shall be deemed a body corporate, and shall have full power to construct and maintain a bridge as aforesaid, with suitable avenues or approaches leading thereto. And said act further provides that said company may lay down a railway track or tracks upon said
113 bridge and its approaches, and shall have the power to contract at any agreed sum or rate with any railroad company organized in said State, under any general or special law, or any other railroad company organized in any other State of the United States, for the use of said bridge by the engines and cars, and for the purpose of said railroad company. That said company shall have power to borrow money on the credit of the corporation, not exceeding its authorized capital stock, at any rate of interest not exceeding seven per cent. per annum, and may execute coupon bonds or other evidences of indebtedness therefor, and, to secure the payment of the same, may pledge or mortgage all or any of the property, rights, income, profits, and franchises of the corporation. And the directors of said company are authorized to sell, negotiate, or pledge any bonds, notes, or other evidences of indebtedness issued in the name of the company to raise money thereon for the use of the company at such times and at such places, either within or without the said State, and for such prices and at such rates of discount as they may deem best; and said act provides that upon the foreclosure of any mortgage made upon the bridge, land, and franchises of the company, and the sale of the property mortgaged, such sale shall pass to the purchaser or purchasers the corporate franchises of such company as fully as the company held them at the time such mortgage was executed.

And said act further provides that said company shall have the right to consolidate its capital stock with the capital stock of any bridge company in an adjoining State authorized to construct a bridge across the

Ohio River in the manner prescribed for the consolidation of railroad companies by an act passed April 10th, 1856 (the provisions of which are the same as those of said amendatory Kentucky charter above recited); and the two companies shall thereupon be merged into one corporation, possessing, within the State of Ohio, all the rights, privileges, and franchises, and subject to all the restrictions, disabilities, and duties of such corporation of said State of Ohio so consolidated. And whereas, on the third day of April, 1868, a company was organized under said act of the general assembly of the State of Ohio, by the name of the Newport and Cincinnati Bridge Company, to construct a bridge across the Ohio River from the city of Cincinnati, Ohio, to the city of Newport, Kentucky; and whereas on the sixteenth day of April, 1868, the directors of said Kentucky and Ohio Bridge Companies entered into an agreement for the consolidation of said companies in accordance with the provisions of the acts above recited, and it is therein, among other things, agreed that the new corporation shall be the Newport and Cincinnati Bridge Company, and that the capital stock of the new corporation shall be one million two hundred thousand dollars, which shall be
114 divided into twelve thousand shares of one hundred dollars each; and on the twentieth day of April, 1868, said agreement of said consolidation was submitted to the stockholders of each of said original companies, at separate meetings called for that purpose, and was adopted by a unanimous vote of said stockholders at each of said meetings; and said agreement of consolidation was filed in the office of the secretary of state of each of the States of Kentucky and Ohio, and said new corporation (the party of the first part herein) was fully organized, by the election of directors and other officers, on the thirteenth day of May, 1868; and whereas on the thirtieth day of June, 1868, an agreement was made between said Newport and Cincinnati Bridge Company of the first part, the Louisville, Cincinnati and Lexington Railroad Company of the second part, and the Little Miami Railroad Company and Columbus and Xenia Railroad Company of the third part, whereby said party of the first part grants to said parties of the second and third parts the perpetual right to pass over and use the track on said bridge and its approaches, with their locomotives, trains, and cars, for all the purposes of their railroads at the rates of toll therein specified. In consideration whereof said parties of the second and third parts thereby severally agree perpetually to guaranty to said party of the first part all the business of their respective roads, which shall comprehend any and all passengers or freight indicated by ticket or bill of lading, so destined to cross the Ohio River, transported over either of said roads, or any part thereof, and said parties of the second and third parts also jointly agree prepetually to guaranty that said party of the first part shall receive the tolls from the business of their roads not less than seventy five thousand dollars per annum; and whereas the Newport and Cincinnati Bridge Company (the party of the first part herein) is desirous to borrow money to be used in the erection of said bridge and its approaches, and to that end said company has determined to make and issue their bonds for the sum of one million two hundred thousand dollars, lawful money of the United States, in sums of one thousand dollars each, numbered from No. 1 to No. 1200, both inclusive, of the form, tenor, and effect as therein set forth and herein recited, payable on the first day of July, one thousand eight hundred and ninety eight, at the Third National Bank, in the city of New York, with interest thereon at the rate of seven per cent. per annum, clear of all taxes, payable semi-annually, on the first day of January and first day of July of each year, at said Third Na-

tional Bank, in the city of New York, and to secure the payment of the same to the lawful holders thereof, and according to the
115 tenor and effect, and terms thereof respectively by their execution of this mortgage upon all the property, real and personal, hereditaments and appurtenances, tolls, revenues, and income rents, issues and profits, and corporate rights and franchises of the said bridge company, to J. Edgar Thomson, as a trustee for benefit and security of and in trust for the holders of the said bonds, according to the tenor, effect, and terms of the same, which said bonds from No. 1 to No. 1200, both inclusive, are to be of the following form, tenor, and effect:

UNITED STATES OF AMERICA,
States of Ohio and Kentucky:

Loan of $1,200,000. Secured by first and only mortgage. Bonds No. 1 to No. 1000 inclusive, to have priority of payment in full.

NEWPORT AND CINCINNATI BRIDGE BOND.

[Number.] $1,000.]

The Newport and Cincinnati Bridge Company.

The Newport and Cincinnati Bridge Company acknowledge themselves to owe for money borrowed to erect their bridge over the Ohio River, from Cincinnati, O., to Newport, Ky., unto J. Edgar Thomson, or bearer, the sum of one thousand dollers, which they promise to pay to the holder thereof on the first day of July, one thousand eight hundred and ninety-eight, at the Third National Bank in the city of New York, together with the interest thereon, at the rate of seven per cent. per annum, clear of all taxes, payable semi annually, on the first day of January and the first day of July in each year, in the Third National Bank in the city of New York, until the payment of the principal upon the presentation and surrender to the said company of the annexed coupon, or interest warrant, for each instalment of interest as it accrues. In case of the non payment of the interest for any half year, when demanded, and the same remaining unpaid for six months, the principal shall, without further demand or notice, become due and payable from and after the expiration of such six months from the date of such default. This bond is transferable by delivery, as well as by general or special indorsement, and is one of twelve hundred bonds numbered from No. 1 to No. 1200, both inclusive, which are entitled to the security of a certain mortgage of even date herewith, on all the property, real and personal, tolls and incomes, rents, issues, and profits of said bridge company, including the income, tolls, benefits, and advantages to accrue from an agreement dated June 30th, 1864, between the obligor herein of the one part, and the Louisville, Cincinnati and Lexing-
116 ton Railroad Company, the Little Miami Railroad Company, and the Columbus and Xenia Railroad Company of the other part; wherein the said railroad companies, in consideration of a grant of the perpetual right to use said bridge for the purposes of their railroads, agree perpetually to guaranty to said obligor all the business of their respective roads, and also that the said obligor shall receive in tolls from the business of their roads not less than seventy five thousand dollars per annum, and on all the corporate rights and franchises of said bridge company, as therein mentioned, duly executed and delivered by

said bridge company to J. Edgar Thomson, in trust, to secure the payment of the said bonds and interest, in the manner and in the order of priority following, to wit: First, to secure the payment in full, without preference or distinction, of one thousand of said bonds, with interest thereon, numbered from No. 1 to No. 1000, both inclusive; second, after the payment of said one thousand bonds, with interest, then to secure the payment in full, without preferences or distinction, of the remaining two hundred of said bonds, with interest thereon, numbered from No. 1001 to No. 1200, both inclusive.

In testimony whereof, the Newport and Cincinnati Bridge Company has caused its corporate seal to be hereunto affixed, and this bond to be signed by its president, and countersigned by its secretary, this tenth day of September, A. D. 1868.

(Signed) ALFRED GAITHER, *President.*

C. H. KILGOUR, *Secretary.*

[SEAL. NEWPORT AND CINCINNATI BRIDGE COMPANY. INCORPORATED 1868.]

(The United States revenue stamps affixed and canceled on the mortgage given to secure these bonds, and so duly recorded.)

The above bond is one of the twelve hundred, of the alike tenor and amount, issued by the Newport and Cincinnati Bridge Company, secured by a mortgage on the property, real and personal, tolls, income and profits, and co-operate rights and franchises of said company, as therein mentioned, dated the tenth day of September, A. D. 1868, duly authorized, executed, and delivered by said company to me as the trustee therein named, and duly recorded, to secure the payment of said bonds, and the interest thereon, according to the tenor, effect, and terms thereof.

(Signed) J. EDGAR THOMSON, *Trustee.*

117 With sixty coupons to each bond of the following form:

$35.00. Warrant for thirty-five dollars, being the half yearly interest on bond No. —— of the Newport and Cincinnati Bridge Co., payable to the bearer at the Third National Bank in New York City, of the 1st day of

(Signed) C. H. KILGOUR, *Sec'y.* 1868.

And none of said bonds to be issued by said party of the first part shall be deemed issued under this mortgage, or be in any way entitled to the benefit or security thereof, or be in any way obligatory upon said party of the first part as evidences of debt or otherwise, unless nor until a certificate thereon shall be signed by the party of second part hereto, or his successor in the said trust, authenticating said bonds as being so issued and secured.

And whereas the board of directors of the party of the first part, at a meeting thereof, held on the twenty-ninth day of August, 1868, by a resolution duly passed and entered on the minutes of said meeting, resolved: "That the bonds of the company, of the form, tenor, and effect as aforesaid, to be issued to the amount of one million two hundred thousand dollars, and this mortgage, be made and executed by the company under its corporate seal to secure the payment of the said bonds and coupons thereto attached according to the tenor, effect, and

terms thereof respectively," and a copy of the mortgage so authorized is entered upon said minutes.

Now, therefore, the Newport and Cincinnati Bridge Company, said party of the first part, in consideration of the premises, and for the purpose of securing the due payment of the bonds proposed to be issued by it as aforesaid, and of the interest to accrue thereon according to the tenor, effect, and terms of said bonds, and the coupons or interest-warrants thereto attached, as aforesaid, and in further consideration of one dollar to the said party of the first part in hand paid by the party of the second part, at or before the ensealing or delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, conveyed, remised, released, assigned, transferred and set over, and by these presents doth grant, bargain, sell, alien, remise, convey, release, assign, transfer and set over unto the said party of the second part, and to his successors and assigns forever, all and singular the bridge of the said party of the first part across the Ohio River from the city of Cincinnati, in the State of Ohio, to the city of New-
118 port, in the State of Kentucky, including the avenues and approaches thereto, and the railroad tract, toll-houses, and other structures and improvements of the party of the first part on said bridge and its approaches, or used or intended to be used for the purposes of or in connection with said bridge, and all the fixtures and personal property of said party of the first part so used or intended to be used.

This mortgage includes all parts of said structure now in existence, or which may be hereafter at any time erected, and all the materials therefor which now or may hereafter at any time be provided, together with the land on which said bridge and the avenues and approaches thereto are located, and all the privileges and appurtenances thereunto belonging, or in any wise appertaining, and all the lands and real estate which the said party of the first part may hereafter acquire for the purposes of or in connection with said bridge, and also all and singular the franchises, rights, privileges and immunities, income, rents, toll, profits, benefits and advantages belonging or appertaining or to arise or accrue from the said bridge with its appurtenances and from the maintenance and operation thereof (including the income, tolls, benefits, and advantages to accrue from said agreement between said bridge company and the Cincinnati, Louisville and Lexington Railroad Company, the Little Miami Railroad Company, and the Columbus and Xenia Railroad Company), to have and to hold all and singular the premises, property, rights, interests, franchises and other things aforesaid, unto the said party of the second part, as trustee, as aforesaid, and his successors, their representatives and assigns, forever, in trust for the use, benefit, and security of all the persons and corporations who shall become owners or lawful holders of the aforesaid bonds to be issued by the said party of the first part, under the security of this mortgage, within the above prescribed limit of one million two hundred thousand dollars in all, according to the tenor, effect, and terms of the said bonds. And it is hereby declared, granted, and agreed that the respective owners or lawful holders of all and every of the bonds issued under and in pursuance of the provisions of this indenture, and entitled to share in the benefits of the mortgage security hereby provided, shall be entitled to share equally in *pro rata* proportions according to the tenor, effect, and terms of said bonds, to the amount thereof, without any preference or priority of one bond over another by reason of priority of time in the issuing or negotiation thereof, or any other preference or priority of one bond over another except as therein provided between the two classes

of bonds indicated by their numbers as the same are set forth. Provided always, nevertheless, and these presents are upon the express con-
119 dition, that if the said party of the first part shall well and truly pay and satisfy the principal and interest, secured by and payable upon all and singular the several bonds issued by the said party of the first part which shall be entitled to the benefit of the mortgage security hereby provided, under or in pursuance of the provisions of this indenture, at the times and in the manner provided for the payment thereof in and by said bonds and the coupons and interest-warrants thereto attached, then this indenture, all and singular the estates, rights and interests thereby granted to or vested in said party of the second part, shall cease, determine and become of no effect. And provided, further, and it is likewise an express condition of this indenture, and of the grants, conveyances and transfers hereby made to the party of the second part, that until the said party of the first part shall have made some default in the payment of the principal or interest secured by or payable upon the bonds issued by the party of the first part entitled to the benefit of the mortgage security hereby provided, or some part of such principal or interest, the said party of the first part shall be entitled to continue in the possession, use and enjoyment of the property, rights, interests, and franchises hereby conveyed in mortgage and in receipt of the income and profits thereof; and while the said party of the first part shall so remain in possession, and no default in the payment of principal or interest upon said bonds or any of them shall have occurred, it shall be lawful and competent for the said party of the second part, or his successor in the said trust, by appropriate instrument or instruments under his hand and seal, to release from the lien, operation and effect of this mortgage or deed of trust any of the real estate acquired by the party of the first part by purchase, donation, condemnation, or in any other manner which is not used or required for the purposes of said bridge, its avenues or approaches, and which the said party of the first part shall in good faith sell and convey to any actual purchaser or purchasers, and require to have so released in order to make a good and clear title to such purchaser or purchasers thereof. And provided, further, and it is hereby declared, granted and agreed that if the said party of the first part shall at any time make default in the due payment of the principal money secured by or payable upon the bonds issued by said bridge company, which by virtue of the provisions hereof shall be entitled to the benefit of the mortgage security provided by this instrument or any of such bonds, or in the due and punctual payment of the interest from time to time accruing and payable upon such bonds, or any of them, at the time and in the manner provided for the payment of such principal or interest, as the case may be, in and by the said bonds or the cou-
120 pons thereto attached, and if such default on the part of the said bridge company shall continue for six months after due demand for payment of such principal or interest, as the case may be, at the proper place for such payment, then after the expiration of such six months, and without any further demand or notice, the said party of the second part, as trustee as aforesaid, or his successor in said trust, on the written request of the holders of such bonds to an amount not less than one hundred thousand dollars of principal, in respect of which there shall have been such continuous default in payment of either principal or interest, is hereby authorized and empowered to, he shall either by himself, or by his agents or attorneys by him thereunto authorized, enter into and take possession of said bridge, its avenues and approaches, hereby mortgaged or conveyed in trust, with the appurte-

tenances and other prem[illegible]ely," and property, rights and interests embraced in and covered by the mortgage lien hereby created, and have, hold, use and enjoy the same, with the privileges and franchises thereunto appertaining, and take and receive the income, tolls, rents, and profits thereof and therefrom accruing with the right to them, to keep open and use the said bridge, its avenues and approaches, and to make such additions thereto for the purpose of completing the same, and such repairs and replacements thereof as to him, in his discretion, for the better and more profitable use and employment of said bridge, and after retaining or paying from and out of the amount by him received for such income, tolls, rents, and profits, all proper disbursements, charges, and expenses incurred by the said trustee in or about the obtaining possession thereof, or in or about the care, management, use, and employment of the said mortgaged premises and property rights and interests, while so in the possession of said trustee, including the costs of the additions, repairs, and replacements made by him, in the exercise of his discretion as aforesaid, and including also the due compensation of all attorneys and agents by him properly employed in and about the premises and reasonable and proper compensation to the said trustee for his own services in respect thereof, to apply the net residues of his receipts from such income tolls, rents, and profits, to or towards the equal pro rata payment of all interest in arrear upon the principal of the then outstanding land bonds entitled to the benefit of the security of this mortgage or deed of trust, in virtue of the provisions herein contained in that behalf, according to the terms, tenor, and effect of said bonds—that is to say, to the equal pro rata payment of the interest in arrear of said bonds numbered from No. 1 to No. 1000, both inclusive, and after the payment of such interest to
121 or towards the payment in equal proportions of the principal of said bonds numbered from No. 1 to No. 1000, both inclusive, and should there be a surplus after the payment in full of such principal and interest, to apply the same to the equal pro rata payment of the interest in arrear of said bonds numbered from No. 1001 to No. 1200, both inclusive; and after the payment of such interest to or towards the payment in equal proportions of the principal of said bonds numbered from No. 1001 to No. 1200, both inclusive, without preference in making such payments to one bond over another, except by virtue of the classification by numbers above specified; and provided, further, and it is hereby declared, granted, and agreed, that at any time after such continuous default in the payment of principal or interest upon the said bonds, or any of them, as in virtue of the provisions above contained shall authorize the said party of the second part, or his successor in said trust, to enter into the possession of the said bridge and other mortgaged premises and property, the said party of the second part, or his successor as such trustee (whether he shall have actually so entered into possession or not), upon the written request of the holders of such bonds, to an amount not less than one hundred thousand dollars of the principal in respect of which such default either in principal or interest shall have accrued, is hereby authorized and empowered, and he shall proceed to sell at public auction to the highest bidder the whole of said bridge hereby mortgaged, with all the appurtenances thereof, and all and singular the premises, property, rights, interests, franchises, and privileges, and things whatsoever hereby mortgaged or conveyed in trust, which shall then be subject to the lien, operation, and effect of this indenture, which sale may and shall be made either in the city of New York, the city of Philadelphia, or the city of Cincin-

nati, as the said trustee for the time being, in his discretion, may deem best, and shall be after at least three months' previous notice of the time, place, and terms of sale and subject matters to be sold shall have been given by such trustee for the time being by advertisement thereof in one newspaper of good circulation in each of the cities of New York, Philadelphia, and Cincinnati, at least once in each week for at least three months immediately preceding the day of sale (together with such other notice, if any, as by law may be absolutely requisite to the validity of the sale, notwithstanding the provisions of this indenture to the contrary) with the liberty, right, and power nevertheless to such trustee for the time being, after once so advertising said sale to adjourn such sale from time to time for such period or periods (which may be less than three months) as to him, in his discretion, may seem suitable, but in case of
122 such adjournment, notice of the fact and of the time and place and terms of sale and the subject matters to be sold shall be given by advertisement thereof, as aforesaid, in one newspaper of good circulation in each of the cities of New York, Philadelphia, and Cincinnati for at least thirty days next preceding the time of said adjourned sale, and the said party of the second part, or his successor as such trustee, is hereby fully authorized and empowered upon the making of such auction sale as aforesaid, in conformity with the foregoing provisions as the attorney in fact of the said party of the first part to make, execute, and deliver to the purchaser or purchasers thereof at such sale good and sufficient deeds, conveyances, and other appropriate instruments of transfer of all and singular the said bridge, its avenues and approaches, with their appurtenances and all other the premises, property, rights and interests, privileges and franchises, and other things whatsoever so sold, which sale and deed, conveyances and other instruments of transfer shall be valid and effectual in law to vest in such purchaser or purchasers, grantee or grantees, assignee or assignees, the title to and ownership of the same, and shall bar and foreclose the said party of the first part and its successors and assigns from all right, claim or equity of redemption in, to, or in respect of the same, and the party of the first part doth hereby covenant that it will, if and when thereunto requested make, execute, and deliver such deeds or other instruments as shall be reasonably advised by counsel to confirm and assure such title and ownership to such purchaser or purchasers so as fully to effectuate the sale hereby authorized.

And the said party of the first part, for itself, its successors and assigns, doth hereby absolutely agree to waive, and doth hereby irrevocably waive the benefit or advantage of any and all valuation, stay, appraisement or extension laws now existing, or which may be hereafter passed by either of the States wherein the property sold, or any part thereof may be situated, or where the said sale may take place, which, but for this provision, agreement, and waiver, might be operative in respect of such sale and transfer, or might be availed of to prevent or postpone the absolute and immediate sale of said premises, property, right, interest, and franchises to the highest bidder upon compliance merely with the provisions herein contained. And the said party of the first part doth hereby covenant that it will not in any manner set up or seek to take the benefit or advantage of any such valuation, stay, appraisement or extension or other law to prevent or hinder such absolute and immediate sale to the highest bidder as hereby provided. And it is hereby provided, declared, and agreed that in case of such auction sale being made by the party of the second part or his successors,
123 as aforesaid, the purchaser or purchasers thereat shall be entitled in making settlement for any payment of the purchase money by

him or them bidden upon such sale, to deliver to said trustee and turn in and use toward the payment of such purchase money, bonds or coupons held by such purchaser or purchasers in the order of and according to the terms and tenor of their payment respectively to or toward the payment whereof the net proceeds of such sale shall be legally applicable, reckoning such bonds or coupons for that purpose at a sum not exceeding that which shall be payable out of the net proceeds of such sale to such purchaser or purchasers, as the holder or holders of such bonds or coupons for his or their just share and proportion in that character of such net proceeds of sale upon due apportionment of and accounting concerning such net proceeds.

And it is hereby further provided, declared, and agreed that from and out of the proceeds of such auction sale to be made as aforesaid, the said trustee for the time being shall be entitled in the first place to retain and pay all proper disbursements, costs, expenses, and charges of or connected with the making of said sale and carrying the same into effect, and distributing the proceeds thereof, including all proper legal expenses, costs and counsel fees in and about the same, together with the proper compensation of all agents or attorneys in fact employed by him in or about the premises, and, likewise, the reasonable commission and compensation of such trustee for making said sale and receiving and disbursing the proceeds thereof, and to the payment of any balance of the due disbursements, costs, charges, expenses and commissions and compensation of the trustee in and about or connected with the care, management, maintenance, use, and employment of the mortgaged premises and property, including repairs, replacements, and additions thereto as aforesaid after the taking possession thereof by the trustee in consequence of six months' default as aforesaid, and which shall not have been met and paid out of the income, tolls, rents, and profits received by said trustee therefrom, together with any interest due upon such deficiency, and also any charges, taxes, or assessments due to the respective States of Ohio and Kentucky or the General Government of the United States, which at the time of such sale may be liens upon the said property sold having legal priority over this mortgage, and then the said trustee shall apply the net balance of the proceeds of such sale, after such payments and deductions therefrom as aforesaid, to the payment in full to the lawful holder or holders thereof of all and singular the then outstanding bonds or coupons or interest warrants issued by the parties of the first part as aforesaid,

according to their terms, tenor and effect, which in virtue of the

124 foregoing provisions of this indenture, shall be entitled to the benefit of the mortgage security provided by this mortgage or deed of trust, including as well the principal of such bonds as the interest in arrear, and if there shall not be adequate funds for the payment thereof in full, then such payment shall be made upon the same equally in pro rata proportion to the respective amounts then owing and unpaid for principal and interest upon such bonds respectively, according to their terms, tenor and effect, that is to say, paying first said bonds numbered from No. 1 to No. 1000, both inclusive, with the interest thereon equally pro rata until they are paid in full, and then said bonds numbered from No. 1001 to No. 1200, both inclusive, with the interest thereon equally pro rata until they are paid in full, and where unpaid coupons shall have been detached from the bonds to which they belong, and shall be held by another person or persons than the holder of the bonds, payment shall be made to such persons to the like total amount as if both bonds and coupons were held by the same person; and after

full payment shall have been made, as hereinbefore provided, of all and singular the then outstanding bonds entitled to the benefit of the mortgage security hereby provided, with all interest in arrear thereon, as aforesaid, any surplus of the net proceeds of such sale which shall then remain, shall belong and be payable to the party of the first part, its successors or assigns; and it is hereby further provided, declared and agreed, that the trustee, or his successor, may appoint and employ, at the expense of the said trust estate, all such attorneys, counselors, clerks, bookkeepers, engineers, and other agents as he may deem proper, in the execution of any of his trusts or duties hereunder, and shall not be answerable for the default or other misconduct or neglect of such attorneys, counsellors, clerks, book keepers, engineers and other agents, unless he be chargeable with culpable negligence in their selection; and further, that the said trustee and his successors shall not be answerable for anything short of gross negligence, willful default in respect of his duties.

And it is further agreed and provided that the said trustee and his successor may resign and discharge himself from the trusts hereby created by notice in writing to such effect to the said bridge company.

And it is further declared, provided, and agreed that in case of death, or resignation of the said trustee or his successor, or his removal from the trust, or becoming mentally incapable of executing the same, a majority in the amount of the holders of the bonds then outstanding issued hereunder, and which shall be entitled to the benefit of the mortgage security hereby created, shall have the right and power, by an instrument in writing over their signatures, to fill the vacancy thus occurring in the trusteeship by the appointment of a person to be trustee hereunder in place of the trustee so dead, resigned, removed or incapacitated, and the person so selected and appointed shall have and possess and be vested with the same rights and powers as a trustee as he would have had possessed or been vested with had he been originally appointed by and been a party to the indenture, and shall perform said duties in all respects while he shall continue to be such trustee.

And in case of a vacancy as aforesaid in said trusteeship, the president of said bridge company shall appoint some suitable person to act as temporary trustee, who shall have full power and authority to execute each and all of the trusts hereby created until such vacancy shall have been filled in the manner herein provided; and for the purpose of filling such vacancy in the office of trustee under this mortgage, the president of said bridge company shall call a meeting of said bondholders, to be held in the city of New York, by a notice thereof to be published once a week for at least thirty days next preceding the time of holding said meeting in one daily newspaper of good circulation in each of the cities of New York, Philadelphia and Cincinnati, to select and designate a trustee to act under this mortgage or deed of trust, and said election when made by a majority in amount of the holders of said bonds then outstanding, shall vacate the powers of the temporary trustee, appointed by the president of said bridge company as aforesaid; and in case any such appointment of a trustee shall be made in either of the modes aforesaid, said bridge company for itself and its successors hereby covenants to make, execute, and deliver all such further instruments, deeds, or indentures as may be necessary and proper to enable the person so appointed to execute the trust hereby created, as fully and perfectly in all respects as he could have executed the same if originally appointed by and a party to this indenture; and the said party of the first part for itself and its successors doth hereby covenant, promise, and agree to and with the said party of the second part and his successors, that

the said party of the first part and its successors shall and will, at any and all times hereafter, upon reasonable request made therefor, make do, execute, and deliver all such other and further acts, deeds, assu ances, and things whatsoever, as shall be requisite and expedient, or i the judgment or opinion of competent counsel shall be so deemed, i order to vest in and assure, and confirm to the party of the second and his successors, as trustees, all and singular the property, est rights, interests and franchises hereby mortgaged or conveye
126 trust, or intended so to be, whether the same be now owne possessed by said party of the first part, or shall be herea acquired to be held by the said trustee and his successors, for the poses of this indenture, and for the due and effectual security of and singular, the bonds, with the interest thereon, according to t terms, tenor and effect, which shall be issued under and in accordance with the provisions herein contained, so as fully to effectuate the intent of these presents in respect of the security of said bonds and interest; and the said party of the second part hereby accepts the trusts hereby created and reposed in him.

In testimony whereof the said party of the first part hath hereunto affixed its corporate seal, and caused these presents to be signed by its president, Alfred Gaither, and attested by its secretary, Charles H. Kilgour, and the said party of the second part, J. Edgar Thompson, has hereunto set his hand and seal the day and year first above written.

ALFRED GAITHER,
President.

(NEWPORT AND CINCINNATI BRIDGE)
(COMPANY, INCORPORATED 1868.)

C. H. KILGOUR,
Secretary.

Signed, sealed, and acknowledged in our presence as to Alfred Gaither and Charles H. Kilgour:

JAMES D. HENRY,
N. HEADINGTON.

J. EDGAR THOMSON. [L. S.]

Signed, sealed, and acknowledged in our presence as to J. Edgar Thomson:

CHAS. C. LISTER,
HENRY C. SPACKMAN.

[Stamped $1,200, internal revenue, cancelled.]

STATE OF OHIO,
Hamilton County, set:

Be it remembered that on this day, the tenth day of October, one thousand eight hundred and sixty eight, before me, the subscriber, a notary public in and for said county, personally came Alfred Gaither, the president, and Charles H. Kilgour, the secretary of the Newport and Cincinnati Bridge Company, and the persons who executed the foregoing indenture as such, and acknowledged the signing and sealing of said indenture to be the voluntary act and deed of the Newport and Cincinnati Bridge Company, for the uses and purposes therein mentioned, and that the seal affixed thereto is the corporate seal of said bridge company, and that they signed said indenture and affixed said corporate seal thereto by order of said bridge company.

In testimony whereof I have hereunto subscribed my name and affixed my notarial seal at Cincinnati the day and year last above written.

[N. P. SEAL.]

JAS. D. HENRY,
Notary Public, Hamilton County, Ohio.

127 STATE OF OHIO, HAMILTON COUNTY,
City of Cincinnati, ss:

I, James D. Henry, commissioner of deeds for the State of Kentucky, duly appointed and commissioned by the governor thereof for the State of Ohio, and authorized to take the acknowledgment of deeds and other writings, do hereby certify that the foregoing indenture between the Newport and Cincinnati Bridge Company and J. Edgar Thomson was this day produced to me, in the city aforesaid, by Alfred Gaither, the president, and Chas. H. Kilgour, the secretary of said company, and the persons who executed said indenture as such, and they then and there, before me, acknowledged the signing and sealing of said indenture to be the voluntary act and deed of the Newport and Cincinnati Bridge Company, for the uses and purposes therein mentioned; that the seal affixed thereto is the corporate seal of said bridge company, and that they signed said indenture and affixed said corporate seal thereto by order of said bridge company.

Given under my hand and seal of office this tenth day of October, A. D. 1868.

[COM. SEAL.] JAMES D. HENRY,
Commissioner for Kentucky in Ohio.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

I, Charles C. Lister, commissioner of deeds, etc., for the State of Kentucky, duly appointed and commissioned by the governor thereof, and authorized to take the acknowledgment of deeds and other writings, do hereby certify that the foregoing indenture between the Newport and Cincinnati Bridge Company and J. Edgar Thomson was this day produced to me in the city aforesaid by J. Edgar Thomson, the person who executed the said indenture as such, and he then and there, before me, acknowledged the signing and sealing of the said indenture to be his voluntary act and deed as trustee, and for the uses and purposes therein mentioned.

Given under my hand and seal of office this fourteenth day of October, A. D. 1868.

[COM. SEAL.] CHAS. E. LISTER,
Commissioner for Kentucky in Pennsylvania.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

Be it remembered that on this fourteenth day of October, A. D. 1868, before me, the subscriber, a commissioner of deeds for the State
128 of Ohio, duly commissioned by the executive thereof to take acknowledgment of deeds, etc., to be used therein, personally came J. Edgar Thomson, the person who executed the foregoing indenture as such, and acknowledged the signing and sealing of the said indenture to be his voluntary act and deed as trustee, for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my official seal, this fourteenth day of October, A. D. 1868.

[COM. SEAL.] CHAS. C. LISTER,
Commissioner for Ohio in Pennsylvania.

STATE OF OHIO,
Hamilton County, ss:

I, Geo. J. Leininger, recorder of the county aforesaid, do hereby certify that the foregoing is a true copy of a mortgage from the Newport

and Cincinnati Bridge Company to J. E. Thomson, trustee, filed and recorded October 28, 1868, in book 298, page 5, Hamilton County, Ohio, records of mortgages.

Witness my hand and official seal this 27th day of May, 1873.

[REC. SEAL.] GEO. J. LEINING,
Recorder Hamilton County, Ohio.

CHAPTER 316.

AN ACT to incorporate the Newport & Cincinnati Bridge Company.

Corporation created.

Name and style.

SECTION 1. Be it enacted by the general assembly of the Commonwealth of Kentucky, that Daniel Wolff, Thomas G. Gaylord, Albert S. Berry, George R. Fearons, H. J. King, R. R. Springer, Alfred Gaither, W. H. Clement, E. W. Woodward, and Chas. H. Kilgour, their associates, successors and assigns, be and they are hereby created a body politic and corporate, with perpetual succession, by the name of "The Newport and Cincinnati Bridge Company," with all the legal rights, powers, and privileges incident to such corporations for the purpose of constructing a bridge from some convenient point within the corporate limits of the city of Newport, across the Ohio River to Cincinnati, in the State of Ohio.

Amount of capital stock.

SEC. 2. The capital stock of the said corporation shall be six hundred thousand dollars, divided into shares of one hundred dollars each, which may be subscribed by individuals, or by municipal, or other corporations created by the laws of this, or any other State or by both individuals and such corporations; but such capital stock may at any time after the organization of the corporation hereby created, be increased to any sum not exceeding twelve hundred thousand dollars, divided into like shares; and power and authority is hereby given the city of Newport, and other municipal corporations created by the laws of this State, to subscribe to the capital stock of said bridge company, and to levy and collect taxes as their several general taxes are collected, and to issue and sell, or to hypothecate bonds for the payment of such subscriptions of stock.

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Power to increase.

Corporations can subscribe to stock.

When corporators may organize.

Stock subscription books.

SEC. 3. The corporators named in the first section of this act, or any number thereof, not less than three, may at any time, after giving at least ten days' notice in two newspapers having general circulation in the cities of Newport, in this State, and Cincinnati, in Ohio, open books for the subscription of stock at places to be designated in Newport and Cincinnati, and there receive subscriptions and authorize such books to be kept open by persons appointed by them, for such length of time as they may see fit, until all the stock shall be taken; and so soon as the sum of three hundred thousand dollars shall be bona fide subscribed in stock, the said corporators may, by giving at least five days' notice to the stockholders personally in writing, or by publication in said newspapers, call a meeting of the stockholders for organization of the company by the election of a president and six directors for said com-

Election of president and board of directors.

pany. Said meeting shall be held at some designated convenient place in the city of Newport.

Who are eligible.

SEC. 4. The president and directors of said bridge company shall be chosen only from among the stockholders, and persons officially connected with corporations owning stock in said bridge company; and when in any case the qualification shall cease the authority to act as president or director shall also cease; and all vacancies occurring in any way in the board of directors, or in the presidency of the company, shall be filled by appointment of the board, until the next regular election. In all elections each stockholder shall be entitled to cast, either in person or by proxy, one vote for each share of stock held to the number of ten, and one vote for each additional ten shares, until the whole number of shares shall reach one hundred, and then one vote for each additional one hundred shares: Provided, That when there shall be a fraction of at least three shares over any ten shares, or a fraction of at least thirty over any one hundred shares, one additional vote be cast for any such fraction.

Vacancies, how filled.

Stock, how voted.

SEC. 5. The first board of directors and the president shall fix the time of the annual meetings of the stockholders, and shall continue in office until the first annual meeting, when their successors shall be chosen, and the term of office thereafter shall be one year, and the annual meeting shall be held at the office of the company. The board shall have the general business management of the affairs of the company, may enact by-laws and rules for the government of the same, not inconsistent with the constitution and laws of this State; may create such other officers as they may deem proper for the transaction of the business of the company; and require of them bond and security for the faithful discharge of their several duties, and to secure a proper disposition of the money and effects of the company; and appoint, or provide for the appointment of all other officers and employés of the company. The president and three directors or four directors shall constitute a quorum of the board.

Time of annual election.

Powers of board.

Assessments.

SEC. 6. The said board of directors, upon their first organization, shall provide for the collection from the stockholders of the stock subscribed, in such instalments as they may see fit, and give notice thereof by advertisement in two newspapers, as aforesaid, by three insertions at least in each; and upon the failure of any stockholder to pay any instalment at the time, and in the manner designated by the board, the company may sue for and recover the same with ten per centum damages in any court of competent jurisdiction; or the board may, after giving due notice to the delinquent stockholders, forfeit said stock, and the sum paid thereon, to the company; and the corporators named in the first section of this act, or such of them as may proceed to organize the company, and the board of directors, shall keep a record of their proceedings, which record when signed by the presiding officer, or copies therefrom, attested and sworn to as true copies by the custodian thereof, or any director or officer of the company,

Delinquent stockholders.

Papers to be kept.

shall be received as evidence of the action in the premises, and the original newspaper in which any of the notices required by this act shall be published, or a copy of such publication certified by the editor, publisher, or printer of any such newspaper to have been published the requisite length of time and sworn to, shall be received as evidence of such publication.

May contract for construction of bridge.

SEC. 7. The said bridge company may contract for the construction of and proceed to construct the bridge named in the first section of this act, and may purchase or have condemned when necessary, and hold so much real estate as may be required by the company for the sight of said bridge, or sites for piers, abutments, and suitable avenues leading to said bridge; and such other land as may be necessary. Provided, that the said bridge shall be constructed so as not to obstruct the navigation of the Ohio River further than the laws of the United States authorize.

May purchase and hold land.

R. R. tracks on bridge.

SEC. 8. The said bridge company has power to lay railroad tracks for the passage of railroad engines and cars of all kinds over said bridge and its avenues and approaches, and to demand and receive reasonable rates of toll for the passing over said bridge upon all persons, railroad cars, vehicles and animals of every kind or description. Provided, that the rates of toll shall at no time exceed the rates authorized to be charged by the Covington and Cincinnati Bridge Company.

Rates of toll.

Penalties for injuring bridge, trespassing, & evading toll.

SEC. 9. Any person who shall wilfully set fire to, or burn any portion of said bridge, with his aiders and abettors shall be deemed guilty of arson, and upon conviction thereof shall be punished for said crime, and any person wilfully obstructing or injuring said bridge or the approaches thereto shall be deemed guilty of trespass, and punished by fine or imprisonment, as provided by law for the punishment of trespass to real property, and moreover be liable to the company in a civil action for treble damages, and any person wilfully evading the payment of tolls with which he may be properly chargeable on said bridge shall be liable to a fine of not less than tenfold the amount of the tolls, the payment of which is so evaded.

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May have r. e. condemned.

Manner of proceedings.

SEC. 10. When it shall become necessary for said Bridge Company to condemn any real estate for the use of the bridge, the company may apply to the county court of Campbell County, which shall issue a writ of ad quod damnum, as the laws of this State now require said writs to issue in case of public roads, and like proceedings shall be had thereunder, and upon the return of such writs if either party be dissatisfied with the finding of the jury, he may appeal to the circuit court, where a re-trial may be had; and should the company desire to take possession of the land for the purpose of proceeding with the work of construction, where dissatisfaction may be expressed by either party, they may after tender and refusal deposit the amount of damages assessed by the jury in some chartered bank in this State, subject to be paid to the owner of the land sought to be condemned, upon the final adjudication of the case: Provided, That when the company shall be

dissatisfied, they shall only be required to tender the amount they claim to be just, but must deposit the remainder, if the tender be not accepted to await final adjudication, and, Provided, That all assessments, tenders and deposits, shall be made in legal coin.

Louisville bridge act.

SEC. 11. All the provisions of an act entitled "An act to incorporate the Louisville Bridge Company," approved March tenth, eighteen hundred and fifty-six, and of an act entitled "An act to incorporate the Louisville Bridge Company," approved February nineteenth, eighteen hundred and sixty-two, so far as applicable to this act, and not inconsistent therewith, are made parts of this act, and this act shall take effect from its passage.

JOHN T. BUNCH,
Speaker of the House of Representatives.
WILLIAM JOHNSON,
Speaker of the Senate.

Approved 5th February, 1868.

J. W. STEVENSON.

By the governor:
S. B. CHURCHILL,
Secretary of State.

COMMONWEALTH OF KENTUCKY:

I, W. T. Samuels, assistant secretary of state, hereby certify that the foregoing is a true copy from the original bill now on file in my office.

133 Witness my hand and seal of office, at my office in
[PLACE OF SEAL.] the city of Frankfort, Ky., this
10th day of February, 1868.

W. T. SAMUELS,
Assistant Secretary.

CHAPTER 587.

AN ACT to amend the charter of the Newport & Cincinnati Bridge Co.

Stock, how voted.

SECTION 1. Be it enacted by the general assembly of the commonwealth of Kentucky, That the fourth section of the act of this general assembly, entitled "An act to incorporate the Newport and Cincinnati Bridge Company," be so amended that in all elections by the stockholders of said company, each share of stock shall entitle the owner thereof to one vote; but after the first election of a president and directors, no person shall vote on any share on which any instalment is due and unpaid; and that so much of said original fourth section as is inconsistent herewith be repealed.

Contracts with railroads.

SEC. 2. That said company shall have the right to contract, at any agreed sum, or rate, with any railroad company chartered by the State of Kentucky, or chartered by or organized under the laws of any other State of the United States, for the use of said bridge by the engines and cars, or for purposes of said railroad company.

Can borrow money.

SEC. 3. That said company shall have power to borrow money on the credit of the corporation not exceeding its authorized capital stock, at a rate of interest not exceeding seven per cent. per annum; and may execute coupon bonds or other evidences of indebtedness therefor, and, to secure the payment of the same, may pledge or mortgage all or any part of the property, rights, income, profits, and franchises of the corporation. And the president and directors of said company are authorized to sell, negotiate, or pledge any bonds, notes, or other evidences of indebtedness issued in the name of the company, to raise money thereon for the use of the company, at such times, and in such places, either within or without this State, and at such rates of discount as they may deem best; and the same, or any portion thereof, may be made and issued convertible into stock of the company on such conditions as the president and directors may prescribe, and upon the foreclosure of any mortgage made upon the bridge, land and franchises of the company, and sale of the property mortgaged, such sale shall pass to the purchaser or purchasers the corporate franchises of such company, as fully as the company held them at the time such mortgage was executed.

Mortgage security.

Sale or foreclosure of mortgage.

Purchasers can own and operate under same name and style.

SEC. 4. That it shall be lawful for such purchaser or purchasers, their associates and successors, to own and operate said bridge under said charter and this amendment thereto, by the name of the "Newport and Cincinnati Bridge Company."

Railroad companies can own stock.

SEC. 5. That any railroad company incorporated by the commonwealth of Kentucky may lawfully subscribe to the stock, or purchase the bonds, or evidences of indebtedness of said bridge company, or make any contract with said bridge company provided for in this act, when authorized by the stockholders at some general meeting.

Power to consolidate with a company organized in Ohio.

SEC. 6. That it shall be lawful for said bridge company to become merged into a new corporation with any bridge company organized under the laws of the State of Ohio, to build a bridge across the Ohio River in the following manner: The president and directors of the several companies may enter into a joint agreement under the corporate seal of each company for the consolidation of said companies; and, prescribing the terms thereof, the mode of carrying the same into effect; the name of the new corporation, the number of the directors and other officers thereof, and their place of residence; the number of shares of the capital stock; the amount of each share, and the manner of converting the capital stock of each of said companies into that of the new corporation, with such other details as they shall deem necessary to perfect such a new organization, and the consolidation of said companies.

Manner of consolidating.

SEC. 7. Said agreement shall be submitted to the stockholders of each of said companies, at a meeting thereof, called separately, for the purpose of taking the same into consideration; due notice of the time and place of holding such meeting, and the object thereof, shall

be given by written or printed notices, addressed to each of the persons in whose names the capital stock of said companies stands on the books thereof, and also by a like notice published in some newspaper printed or of general circulation in the city or town where such company has its principal office or place of business. And at the said meeting of stockholders the agreement of said president and directors shall be considered, and a vote by ballot taken for the adoption or rejection of the same, each share entitling the holder thereof to one vote, and the ballots shall be cast in person, or by proxy, and if two-thirds of all the votes of all the stockholders shall be for the adoption of the said agreement, then that fact shall be certified thereon by the secretary of each of said companies, and the agreement so adopted, or a certified copy thereof, shall be filed in the office of the secretary of state, and shall be deemed and taken to be the agreement and act of consolidation of said companies: and a copy of said agreement and act of consolidation duly certified by the secretary of state, under the seal of the State of Kentucky, shall be the evidence of the existence of said corporation.

All rights, powers, and restrictions to apply to consolidated co.

SEC. 8. That upon the making and perfecting the agreement and act as provided in the preceding section and filing the same, or a copy thereof, with the secretary of state, the several corporations, parties thereto, shall be deemed and taken to be one corporation, possessing within this State all the rights, privileges, and franchises, and subject to all the restrictions, disabilities, and duties of said Newport and Cincinnati Bridge Company, under said charter and this amendment thereof.

Directors of consolidated co.

SEC. 9. That it shall be the duty of the stockholders at the meeting call' to take into consideration said agreement as hereinbefore provided for, after the adoption of the same, to appoint a time and place for the election of the directors and other officers of the new corporation, which may be provided for in said agreement, notice whereof shall be given by the secretary of each of said companies, in some newspaper printed or of general circulation at the place of the principal office of each of said companies, of the time and place of said election at least three weeks previous thereto, which election shall be conducted in the manner that may be prescribed by said meeting of stockholders.

136 SEC. 10. That upon the election of the first board of directors of said new corporation, all and singular the rights, privileges, and franchises of each of said corporations, parties to said agreement, and the property, real, personal, and mixed, and the debts due on account of subscription of stock, or other things in action, shall be deemed to be transferred and vested in such new corporation, without further act or deed; and all property and other interest shall be as effectually the property of the new corporation as they were of the former corporation, parties to said agreement, and the title to real estate, either by deed, gift, grant, or by condemnation under the laws of this State, shall not be deemed to revert, or be impaired by reason of this act: Provided, That all rights of creditors and all liens upon

Powers of consol'd board.

Title of real estate & rights of creditors not affected by consolidation.

the property of said corporations shall be preserved unimpaired, and the respective corporations may be deemed to be in existence to preserve the same; and all debts, liabilities, and duties of either of said companies shall thenceforth attach to such new corporation, and be enforced against it to the same extent, as if said debts, liabilities, and duties had been contracted by it.

Stockholders refusing to convert stock company to purchase the same.

SEC. 11. That any stockholder who shall refuse to convert his stock into the stock of the consolidated company, shall be paid the highest market value of such stock at any time within six months next preceding the time of the making of such agreement for consolidation by the president and directors if, previous to such consolidation, he shall so require; and if the stockholders so refusing to consolidate, and the president and directors of said Newport and Cincinnati Bridge Company cannot agree as to the value of said stock, it shall be lawful for the parties to submit the question to arbitration by three disinterested persons to be appointed by the judge of the circuit court of Campbell County upon the motion of either of the parties; and if the person so refusing to convert his stock shall refuse to submit the question to arbitration, said judge shall, upon the application of any director of said company, appoint such arbitrators, who shall proceed to ascertain the value of the stock, the same as if the question had been submitted by the consent of both parties; and if the party owning the stock shall refuse to receive the amount it shall be lawful for the company to deposit the same in the name of said owner in any chartered bank of this State, which deposit shall authorize said companies to proceed to consolidate without further payment to such stockholder.

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Repeals 11 sect. of original act.

SEC. 12. That the eleventh section of the act to which this is amendatory, except so much thereof as declares said act shall take effect from its passage, is hereby repealed.

SEC. 13. This act shall take effect and be in force from and after its passage.

JOHN T. BUNCH,
Speaker of the House of Representatives.
WILLIAM JOHNSON,
Speaker of the Senate.

Approved 26th February, 1868.
J. W. STEVENSON.

By the Governor:
S. B. CHURCHILL,
Secretary of State.

COMMONWEALTH OF KENTUCKY:

I, W. T. Samuels, assistant secretary of state, hereby certify that the foregoing bill is truly copied from the original bill now on file in the office of secretary of state.

Witness my hand and official seal of state, at my office in the city of Frankfort, this 27th Feb'y, 1868.

[PLACE OF SEAL.]

W. T. SAMUELS,
Assistant Secretary.

AN ACT supplementary to an act entitled "An act to provide for the creation and regulation of incorporated companies in the State of Ohio," passed May 1, 1852.

Organization of company.

SEC. 1. Be it enacted by the general assembly of the State of Ohio, That whenever any number of persons, as provided in the first section of said act, shall associate to form a company for the construction of a bridge across the Ohio River, they shall make a certificate, under their hands and seals, which shall specify as follows: 1. The name of said company, and by which it shall be known. 2. The name of the place where such bridge shall be built. 3. The amount of the capital stock of such company, and
138 the number of shares of which said stock shall consist. Said certificate shall be acknowledged, certified, forwarded to the secretary of state, and recorded, as provided in the second section of said act; and a copy thereof, duly certified by the secretary of state, under the great seal of the State of Ohio, shall be evidence of the existence of said company.

Corporate powers, &c.

SEC. 2. That whenever the foregoing provisions have been complied with, the persons named as corporators in said certificate are hereby authorized to carry into effect the objects named in said certificate, in accordance with the provisions of said act, and of this supplementary act; and they and their associates, successors and assigns, by the name and style provided in said certificate, shall thereafter be deemed a body corporate, with succession, and shall have the same general corporate powers as are provided in the third section of said act, and shall be subject to all the restrictions hereinafter contained.

Subscriptions to capital stock.

SEC. 3. That the corporators named in said certificate, or any three of them, shall be authorized to open books for receiving subscriptions to the capital stock of said company, at such time or times, and at such place or places, as they may deem expedient, after having given at least ten days' notice in the newspaper published or generally circulated in the county where such bridge is to be built; and as soon as ten per centum of the capital stock shall be subscribed, they shall give notice for the stockholders to meet at such time and place as they may designate, for the purpose of choosing seven directors, who shall be stockholders in said company, and one of whom shall be president, to be named on the tickets when voted for by the stockholders, as aforesaid; said president and directors shall be chosen by ballot, by such of the stockholders as shall attend for that purpose at the time and place appointed, either in person or by lawful proxies; and each share shall entitle the owner to one vote, and a plurality of votes shall be necessary for a choice; but after the first election no person shall vote on any share on which any installment is due and unpaid. A majority of said directors shall form a board, and be competent to fill vacancies in their board, make by-laws, appoint officers and agents other than the president, and transact all business of the corporation. And a new election for president
139 and directors shall be held annually at such time and place as the stockholders at their first meeting may

Meeting of stockholders and election of directors.

Annual election of president & directors.

determine, but a majority of the stockholders in interest may, at any regular annual meeting, change the time of the annual meeting of said company.

Construction of bridges.

SEC. 4. That said company shall have full power to construct and maintain a bridge, as aforesaid, with suitable avenues or approaches leading thereto, and said bridge may be constructed either with a single span, or with a draw, as the company may determine; but in either case, in order that said bridge may not obstruct the navigation of said river, the same shall be built in accordance with the provisions of an act of Congress, approved July 14, 1862, entitled "An act to establish certain post roads," or of any act that Congress may hereafter pass on the subject.

Company may purchase or appropriate real estate.

SEC. 5. That said company shall have the power to purchase, or to appropriate in the manner provided by law, and hold such real estate as in the opinion of the directors of said company will be required for the site of such bridge, and of suitable avenues or approaches leading thereto, or may locate the same on any public street, road or avenue; and said company shall be responsible for injuries done to private property adjacent or near to such bridge by its location and construction, which may be recovered in a civil action brought by the owner or owners at any time within two years from the completion thereof.

Company responsible for injuries to private property.

Rates of toll.

SEC. 6. That said company shall have the right to fix reasonable rates of toll, and collect the same for all persons, animals, vehicles and property passing or transported over said bridge; provided, that such rates of toll shall at no time exceed those collected at the Covington and Cincinnati bridge, and that said company shall set up, and keep in a conspicuous place, at each end of said bridge, a board on which such rates of toll shall be written, painted or printed in a plain and legible manner.

Bridge may be used by R. R. Cos.

SEC. 7. That said company may lay down a railway track or tracks upon said bridge and its approaches, and shall have the right to contract at any agreed sum or rate, with any railroad company organized in this State under any general or special law, or any railroad company organized in any other State of the United States for the use of said bridge, by the engines and cars, and for the purposes
140 of said railroad company; and any such railroad company organized or that may hereafter be organized in this State, is hereby authorized to enter into such contract with said bridge company; provided, however, that said bridge company shall not have the right to charge or collect from such railroad company, for the use of said bridge in the transportation over the same of cars, railroad passengers and freights, a greater toll than the following:

Proviso as to tolls.

For each ton (2,000 lbs.) of freight, not exceeding fifteen cents.

For each railroad passenger, not exceeding fifteen cents.

For each passenger, baggage, mail, and express car, not exceeding one dollar.

For each eight-wheeled freight-car, fifty cents.

For each four-wheeled freight-car, not exceeding twenty-five cents.

Company may borrow money &c. issue bonds, &c.

SEC. 8. That said company shall have power to borrow money on the credit of the corporation, not exceeding its authorized capital stock, at any rate of interest, not exceeding seven per cent. per annum, and may execute coupon bonds, or other evidences of indebtedness therefor, and to secure the payment of the same may pledge or mortgage all or any of the property, rights, income, profits, and franchises of the corporation. And the directors of said company are authorized to sell, negotiate, or pledge any bonds, notes, or other evidences of indebtedness issued in the name of the company, to raise money thereon for the use of the company, at such times and at such places, either within or without this State, and for such prices and at such rates of discount as they may deem best; and the same, or any portion thereof may be made and issued, convertible into stock of the company on such conditions as the directors may prescribe; and upon the foreclosure of any mortgage made upon the bridge, land, and franchises of the company, and the sale of the property mortgaged, such sale shall pass to the purchaser or purchasers the corporate franchises of such company, as fully as the company held them at the time such mortgage was executed.

Railroad companies or private corporations may become stockholders.

SEC. 9. That any railroad company or other private corporation organized under any general or special law
141 of this State, may become a subscriber to the capital stock of said bridge company to an amount not exceeding one-third of such stock, or may purchase or take, by way of pledge, any of the bonds or other evidences of indebtedness issued by said bridge company.

Consolidation of capital stock.

SEC. 10. That said company shall have the right to consolidate its capital stock with the capital stock of any bridge company in an adjoining State authorized to construct a bridge across the Ohio River in the manner prescribed for the consolidation of railroad companies by an act passed April 10, 1856, entitled "An act to authorize the consolidation of railroad companies in this State with railroad companies of States adjoining in certain cases, and to authorize railroad companies in this State to extend their roads into adjoining States," and the two companies shall thereupon be merged into one corporation, possessing within this State all the rights, privileges, and franchises, and subject to all the restrictions, disabilities, and duties of such corporation of this State so consolidated.

Span and altitude of bridge.

SEC. 11. That any such company may fix or change the span and altitude of any bridge which it may erect and construct across the Ohio River; provided, that the span of any such bridge be not less than three hundred feet in the clear over the main channel, and not less than two hundred and twenty feet in the clear in one of the next adjoining spans, and the height of the bridge in the center of the span over the main channel, shall not be less than one hundred feet above the surface of the water at low water, measuring for such elevation to the bottom chord of the bridge, and such height above extreme high-water mark as may be provided in any act of Congress now in force, or which

may hereafter be passed; but this section shall not apply to any bridge built with a draw, in accordance with the provision of an act of Congress approved July 14, 1862, entitled "An act to establish certain post roads," or any act that Congress may hereafter pass upon the subject.

SEC. 12. This act shall take effect and be in force from and after its passage.

JOHN F. FOLLET,
Speaker of the House of Representatives.
T. J. GODFREY,
President pro tem. of the Senate.

Passed April 3, 1868.

142 STATE OF OHIO,
Office of the Secretary of State:

I, John Russell, Secretary of State of the State of Ohio, do hereby certify that the foregoing is a true copy of an act therein named, passed by the General Assembly of the State of Ohio, on the 3d day of April, A. D. 1868, taken from the original rolls on file in this office.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of this office, at Columbus, on the 3d day of April, A. D. 1868.

[SEAL OF THE SEC. OF STATE.]

JOHN RUSSELL,
Secretary of State.

Certificate of incorporation of the Newport and Cincinnati Bridge Company.

The undersigned, Charles H. Kilgour, James R. Hallam, Thomas W. Yardley, Fredrick Blankerer, and Nicholas Headington, hereby associate themselves together for the construction of a bridge across the Ohio river, under and by virtue of an act of the legislature of the State of Ohio, passed April 3, 1868, entitled "An act supplementary to an act entitled an act to provide for the creation and regulation of incorporated companies in the State of Ohio, passed May 1, 1852;" and make this certificate under our hands and seals, and hereby specify as follows:

1. The name of said company, and by which it shall be known, is the Newport and Cincinnati Bridge Company. Name of Co.

2. Said bridge shall be built from the city of Cincinnati, Hamilton County, Ohio, across the Ohio River, to the city of Newport, Kentucky. Location.

3. The amount of the capital stock of said company shall be one hundred thousand dollars, which shall be divided into one thousand shares of one hundred dollars each. Amount of capital stock.

In testimony whereof we have hereunto set our hands and seals this third day of April, A. D. 1868.

C. H. KILGOUR. [SEAL.]
J. R. HALLAM. [SEAL.]
T. W. YARDLEY. [SEAL.]
FREDRICK BLANKERER. [SEAL.]
N. HEADINGTON. [SEAL.]

143 THE STATE OF OHIO,
Franklin County, ss:

Be it remembered, that on this third day of April, 1868, before the

subscriber, a justice of the peace in and for said county, personally appeared Charles H. Kilgour, James R. Hallam, Thomas W. Yardley, Fredrick Blankerer, and Nicholas Headington, the parties to the foregoing certificate of incorporation, and severally acknowledged the signing and sealing thereof to be their voluntary act and deed for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto set my hand and seal the day and year last above written.

SAM'L GULICK. [SEAL.]

[Eight cents U. S. internal revenue stamp cancelled.]

THE STATE OF OHIO,
Franklin County, ss:

I, T. S. Shepard, clerk of the court of common pleas, within and for said county and State aforesaid, do hereby certify that Samuel Gulick, esq., before whom the foregoing acknowledgment was made, was at that time and still is acting justice of the peace in and for said county, duly commissioned and sworn; and that all his official acts as such are entitled to full faith and credit; and that the foregoing signature, purporting to be his, is true and genuine.

Witness my hand and seal of said court this third day of April, A. D. 1868.

COMMON PLEAS OF THE COUNTY OF FRANKLIN, SEAL. T. S. SHEPARD, *Clerk.*

[Five cents internal revenue stamp cancelled.]

UNITED STATES OF AMERICA, OHIO.
Secretary of State's Office:

I, John Russell, Secretary of State of the State of Ohio, do hereby certify that the foregoing is a true copy of the certificate of incorporation of the Newport and Cincinnati Bridge Company, filed in this office April 3, 1868.

In testimony whereof, I have hereunto subscribed my name and affixed the great seal of the State of Ohio, at Columbus, the 3d day of April, A. D. 1868.

[PLACE OF SEAL.] JOHN RUSSELL,
Secretary of State.

144 *Agreement of consolidation between the Newport and Cincinnati Bridge Company, a corporation chartered by the State of Kentucky, and the Newport and Cincinnati Bridge Company, a corporation organized under the laws of the State of Ohio.*

This agreement, made and entered into this sixteenth day of April, A. D. 1868, between E. W. Woodward, the president, and A. S. Berry, James Taylor, George R. Fearons, T. G. Gaylord, T. W. Yardley, and C. H. Kilgour, the directors of the Newport and Cincinnati Bridge Company, a corporation chartered by an act of the legislature of Kentucky, approved 10th day of February, 1868, and an act of the legislature of Kentucky, amendatory thereof, approved 27th day of February, 1868, and Wm. H. Clement, the president, and Daniel Wolff, M. J. King, Wm. Elden, John M. Freeman, Wm. Galway, and N. Headington, the directors

of the Newport and Cincinnati Bridge Company, a corpoa tion organized under an act of the legislature of the Stat of Ohio, passed April 3rd, 1868, entitled "An act supple mentary to an act entitled 'An act to provide for the crea tion and regulation of incorporated companies in the Stat of Ohio,' passed May 1st, 1852," witnesseth:

That it is hereby agreed said companies shall be consoli dated into one corporation, upon the following terms an conditions, namely:

1. This agreement shall be carried into effect by submit ting the same to the stockholders of each of said companie at a meeting thereof, called separately, for the purpose o taking it into consideration, in pursuance of said amendator, charter of said Kentucky company, and said act of the leg islature of Ohio, passed April 3rd, 1868. And if at sai separate meetings two-thirds of all the votes of all the stock holders of each of said companies shall be for the adoptio of this agreement, then that fact shall be certified thereo by the secretary of each of said companies, and this agree ment, or a certified copy thereof, shall be filed in the offic of the Secretary of State of the Commonwealth of Kentuck and in the office of the Secretary of State of Ohio, and shal be deemed and taken to be the agreement and act of consol idation of said companies.

Stockholders to vote on same.

2. The name of the new corporation shall be the Newport and Cincinnati Bridge Company.

Name of Co

3. There shall be seven directors of said new corpo- 145 ration, who shall be stockholders therein, one of whom shall be the president, to be named on the tickets when voted for by the stockholders. Three of said directors, other than the president, shall be residents of the State of Kentucky, and the other three of the State of Ohio, and the president may be a resident of either of said States. At the separate meetings of the stockholders of said companies, called for the purpose of considering this agreement, if the same shall be adopted, a time and place shall be fixed for a meeting of the stockholders of the new corporation to elect said president and directors; and if said meetings should fail to agree upon a time and place for such election, the presidents of said companies, who are above named, o either of them, may give notice for the stockholders of th new corporation to meet at such time and place as they, o either of them giving such notice, may designate, for the purpose of choosing said president and directors of said new corporation, who shall be chosen by ballot by such of the stockholders as shall attend for that purpose at the time and place appointed, either in person or by lawful proxies and each share shall entitle the owner to one vote, and a plurality of votes shall be necessary to a choice; but afte the first election of president and directors, no person shall vote on any share of stock on which any instalment is due and unpaid. A majority of said directors shall form a board and be competent to make by-laws, to fill vacancies in thei board and in the office of president, to appoint and remov all other officers and agents, and transact all business of the new corporation. And a new election for president and di

Directors and officers.

Residence of same.

Fixing time and place for meeting of stockholders.

Manner of voting.

Powers of board.

ectors shall be held annually, at such time and place as he stockholders at their first meeting may determine; but majority of the stockholders in interest may, at any regur annual meeting, change the time of the annual meeting f said corporation. Annual election.

4. The capital stock of the new corporation shall be one illion two hundred thousand dollars, which shall be di- ided into twelve thousand shares of one hundred dollars ach. And as the aggregate amount now subscribed to the apital stock of said companies is not equal to the amount f the capital stock of the new corporation herein provided r, and as no certificates have been issued for the same, each and every subscription heretofore made to the 6 capital stock of said companies shall be taken and considered as a subscription to the capital stock of e new corporation; and certificates for said stock shall be sued accordingly. Amount of capital stock.

5. The board of directors of the new corporation shall be uthorized to open books for receiving subscriptions to the emainder of the capital stock of the new corporation, at uch time or times, and at such place or places as they may eem expedient, after having given at least ten days' notice n a newspaper published in the city of Cincinnati, and enerally circulated in Hamilton County, Ohio, and Camp- ell County, Kentucky. Stock subscription books.

In testimony whereof, the presidents and directors above named of each of said companies have hereunto subscribed their names, and caused the seals of their respective companies to be hereunto affixed in duplicate, the day and year first above written.

(Signed) E. W. WOODWARD, *Prest.* [SEAL.]
ALBERT S. BERRY,
C. H. KILGOUR,
T. W. YARDLEY,
T. G. GAYLORD,
JAMES TAYLOR,
GEO. R. FEARONS.

(Signed) W. H. CLEMENT, *Prest.* [SEAL.]
D. WOLFF,
M. J. KING,
J. M. FREEMAN,
WM. ELDEN,
WM. GALWAY,
N. HEADINGTON.

I, C. H. Kilgour, the secretary of the Newport and Cinnati Bridge Company, a corporation chartered by the tate of Kentucky, do hereby certify that a meeting of the tockholders of said company was called separately, to be eld on the 20th day of April, 1868, for the purpose of takng the foregoing agreement into consideration; that due otice of the time and place of holding such meeting, and he object thereof, was given by written notices, addressed o each of the persons in whose names the capital stock of aid company stands on the books thereof, and also by a ike notice published in the Cincinnati Daily Enquirer, a Certificate of Sec. of Kentucky Co.

newspaper of general circulation in the city of Newport Kentucky, where said company has its principa office.

147 That there are thirty-four hundred and thirty seven shares of the capital stock of said company subscribed for and standing in the names of the subscribers on the books of the company. That said meeting was held in pursuance of said notice, and a vote taken by ballot for the adoption or rejection of said agreement, and upon said vote being taken the holders of thirty-four hundred and thirty-seven shares of said capital stock voted thereon in person or by lawful proxies for the adoption of said agreement, the same being more than two-thirds of all the votes of all the stockholders.

In testimony whereof, I have hereunto set my hand and seal this 16th day of April, A. D. 1868.

(Signed) C. H. KILGOUR,
Secretary Newport and Cincinnati Bridge Company, as chartered by the State of Kentucky.

Certificate of Sec. of Ohio Co.

I, N. Headington, the secretary of the Newport and Cincinnati Bridge Company, a corporation organized under the laws of the State of Ohio, do hereby certify that a meeting of the stockholders of said company was called separately to be held on the 20th day of April, 1868, for the purpose of taking the foregoing agreement into consideration; that due notice of the time and place of holding such meeting, and the object thereof, was given by written notices addressed to each of the persons in whose names the capital stock of said company stands on the books thereof, and also by a like notice published in the Cincinnati Daily Enquirer, a newspaper printed and of general circulation in the city of Cincinnati, Ohio, where said company has its principal office.

That there are two hundred and forty-two shares of the capital stock of said company subscribed for and standing in the names of the subscribers on the books of the company. That said meeting was held in persuance of said notice, and a vote taken by ballot for the adoption or rejection of said agreement, and upon said vote being taken the holders of two hundred and forty-two shares of said capital stock voted thereon in person or by lawful proxies for the adoption of said agreement, the same being more than two thirds of all the votes of all the stockholders.

In testimony whereof I have hereunto set my hand and seal this sixteenth day of April, A. D. 1868.

(Signed) N. HEADINGTON,
Secretary Newport and Cincinnati Bridge Company, organized under the laws of Ohio.

148 UNITED STATES OF AMERICA, OHIO,
Office of the Secretary of State:

I, John Russell, secretary of state of the State of Ohio, do hereby certify that the foregoing is a true copy of the "Agreement of consolidation between the Newport and Cincinnati Bridge Company, a corporation chartered by the

State of Kentucky, and the 'Newport and Cincinnati Bridge Company,' a corporation organized under the laws of the State of Ohio," filed in this office this 3rd day of June, A. D. 1868.

In testimony whereof I have hereunto subscribed my name and affixed the great seal of the State of Ohio, at Columbus, the 3rd day of June, A. D. 1868.

[SEAL OF OHIO.] JOHN RUSSEL,
Secretary of State.

Agreement of consolidation between the Newport and Cincinnati Bridge Company, a corporation chartered by the State of Kentucky, and the Newport and Cincinnati Bridge Company, a corporation organized under the laws of the State of Ohio.

This agreement, made and entered into this sixteenth day of April, A. D. 1868, between E. W. Woodward, the president, and A. S. Berry, James Taylor, George R. Fearons, T. G. Gaylord, T. W. Yardley, and C. H. Kilgour, the directors of the Newport and Cincinnati Bridge Company, a corporation chartered by an act of the legislature of Kentucky, approved 10th day of February, 1868, and an act of the legislature of Kentucky amendatory thereof, approved 27th day of February, 1868, and Wm. H. Clement, the president, and Daniel Wolff, M. J. King, Wm. Elden, John M. Freeman, Wm. Galway, and N. Headington, the directors of the Newport and Cincinnati Bridge Company, a corporation organized under an act of the legislature of the State of Ohio, passed April 3d, 1868, entitled "An act supplementary to an act entitled 'An act to provide for the creation and regulation of incorporated companies in the State of Ohio,' passed May 1st, 1852," witnesseth,

That it is hereby agreed said companies shall be consolidated into one corporation, upon the following terms and conditions, namely:

Stockholders to vote on same.

1. This agreement shall be carried into effect by submitting the same to the stockholders of each of said companies at a meeting thereof, called separately, for the pur-
149 pose of taking it into consideration, in pursuance of said amendatory charter of said Kentucky company, and said act of the legislature of Ohio, passed April 3d, 1868. And if at said separate meetings two-thirds of all the votes of all the stockholders of each of said companies shall be for the adoption of this agreement, then that fact shall be certified thereon by the secretary of each of said companies, and this agreement or a certified copy thereof shall be filed in the office of the secretary of state of the commonwealth of Kentucky, and in the office of secretary of state of the State of Ohio, and shall be deemed and taken to be the agreement and act of consolidation of said companies.

Name of co.

2. The name of the new corporation shall be the Newport and Cincinnati Bridge Company.

Directors and officers.

3. There shall be seven directors of said new corporation who shall be stockholders therein, one of whom shall be the

president, to be named on the tickets when voted for by the stockholders. Three of said directors other than the president shall be residents of the State of Kentucky, and the other three residents of the State of Ohio, and the president may be a resident of either of said States. At the separate meetings of the stockholders of said companies, called for the purpose of considering this agreement, if the same shall be adopted, a time and place shall be fixed for a meeting of the stockholders of the new corporation, to elect said president and directors, and if said meetings should fail to agree upon a time and place for such election, the presidents of said companies, who are above named, or either of them, may give notice for the stockholders of the new corporation to meet at such time and place as they or either of them giving such notice may designate, for the purpose of choosing said president and directors of said new corporation, who shall be chosen by ballot by such of the stockholders as shall attend for that purpose at the time and place appointed either in person or by lawful proxies, and each share shall entitle the owner to one vote; and a plurality of votes shall be necessary to a choice, but after the first election of president and directors no person shall vote on any share of stock on which any installment is due and unpaid. A majority of said directors shall form a board, and be competent to make by-laws, to fill vacancies in their board and in the office of president, to appoint and remove all other officers and agents, and transact all business of the new corporation. And a new election for president and directors shall be held annually at such time and place as the stockholders at their first meeting may determine, but a majority of the stockholders in interest may, at any regular annual meeting change the time of the annual meeting of said corporation.

Residence of same.

Fixing time & place for meeting of stockholders.

Manner of voting.

Powers of board.

Annual election.

Amount of capital stock.

4. The capital stock of the new corporation shall be one million two hundred thousand dollars, which shall be divided into twelve thousand shares of one hundred dollars each. And as the aggregate amount now subscribed to the capital stock of said companies is not equal to the amount of the capital stock of the new corporation herein provided for, and as no certificates have been issued for the same, each and every subscription heretofore made to the capital stock of said companies shall be taken and considered as a subscription to the capital stock of the new corporation; and certificates for said stock shall be issued accordingly.

Stock subscription books.

5. The board of directors of the new corporation shall be authorized to open books for receiving subscriptions to the remainder of the capital stock of the new corporation at such time or times and at such place or places as they may deem expedient, after having given at least ten days' notice in a newspaper published in the city of Cincinnati, and generally circulated in Hamilton County, Ohio, and Campbell County, Kentucky.

In testimony whereof the president and directors above named of each of said companies have hereunto subscribed their names and caused the seals of their respective com-

panies to be affixed in duplicate the day and year first above written.

(Signed) E. W. WOODWARD, *Pres't.* [SEAL.]
ALBERT S. BERRY.
C. H. KILGOUR.
T. W. YARDLEY.
T. G. GAYLORD.
JAMES TAYLOR.
GEO. R. FEARONS.
(Signed) W. H. CLEMENT, *Pres't.* [SEAL.]
D. WOLFF.
M. J. KING.
J. M. FREEMAN.
WM. ELDEN.
WM. GALWAY.
N. HEADINGTON.

151 I, C. H. Kilgour, the secretary of the Newport and Cincinnati Bridge Company, a corporation chartered by the State of Kentucky, do hereby certify that a meeting of the stockholders of said company was called separately to be held on the 20th day of April, 1868, for the purpose of taking the foregoing agreement into consideration; that the notice of the time and place of holding such meeting, and the object thereof, was given by written notices, addressed to each of the persons in whose name the capital stock of said company stands on the books thereof, and also by a like notice published in the Cincinnati Daily Enquirer, a newspaper of general circulation in the city of Newport, Kentucky, where said company has its principal office. Certificate of sec. of Kentucky co.

That there are thirty-four hundred and thirty-seven shares of the capital stock of said company subscribed for and standing in the names of the subscribers on the books of the company; that said meeting was held in pursuance of said notice, and a vote taken by ballot for the adoption or rejection of said agreement, and upon said vote being taken the holders of thirty-four hundred and thirty-seven shares of said capital stock voted thereon in person or by lawful proxies for the adoption of said agreement, the same being more than two-thirds of all the votes of all the stockholders.

In testimony whereof I have hereunto set my hand and seal this 16th day of April, A. D. 1868.

(Signed) C. H. KILGOUR,
Secretary Newport and Cincinnati Bridge Company, as chartered by the State of Kentucky.

I, N. Headington, the secretary of the Newport and Cincinnati Bridge Company, a corporation organized under the laws of the State of Ohio, do hereby certify that a meeting of the stockholders of said company was called separately to be held on the 20th day of April, 1868, for the purpose of taking the foregoing agreement into consideration; that due notice of the time and place of holding such meeting, and the object thereof, was given by written notices addressed to each of the persons in whose names the capital stock of said company stands on the books thereof, and also Certificate of sec. of Ohio co.

by a like notice published in the Cincinnati Daily Enquirer, a newspaper printed and of general circulation in the city of Cincinnati, Ohio, where said company has its principal office.

That there are two hundred and forty-two shares
152 of the capital stock of the said company subscribed for and standing in the names of the subscribers on the books of the company; that said meeting was held in pursuance of said notice, and a vote taken by ballot for the adoption or rejection of said agreement. And upon said vote being taken, the holders of two hundred and forty-two shares of said capital stock voted thereon in person or by lawful proxies for the adoption of said agreement, the same being more than two-thirds of all the votes of all the stockholders.

In testimony whereof I have hereunto set my hand and seal this sixteenth day of April, A. D. 1868.

(Signed) N. HEADINGTON,
Secretary Newport and Cincinnati Bridge Company, organized under the laws of Ohio.

COMMONWEALTH KENTUCKY.
Office Secretary of State:

I, Sam. B. Churchill, Secretary of State, hereby certify, that the foregoing is a true copy of the original this day filed in my office.

Witness my hand and seal of office at Frankfort, Kentucky, this 3d June, 1868.

[SEAL OF KY.] S. B. CHURCHILL, *Secretary*,
By W. T. SAMUELS, *Ass't.*

AN ORDINANCE granting to the Newport and Cincinnati Bridge Company the use of a portion of a street for the purpose of a bridge.

Use of street.

SECTION 1. Be it ordained by the city council of the city of Newport, that a perpetual grant is hereby made to the Newport and Cincinnati Bridge Company of such portion of Saratoga street, if found practicable, and if not so found, then of any other street in said city between the Licking River and the east line of East-Row street, as may be necessary for the construction of the abutments, superstructure, and approaches to said bridge, and for the use and operation thereof.

Terms of grant.

SEC. 2. Said bridge shall be constructed and used for the passage of vehicles and foot passengers across the Ohio river, and for railroad purposes.

Use of wharf.

SEC. 3. This ordinance shall vest in said company only such rights and privileges as the city of Newport may lawfully grant in such streets for the uses and purposes
153 before mentioned, and said bridge shall be constructed so as to present as little obstruction as possible to the ordinary use of such streets. And the said company shall have the free use of such portion of the unimproved wharf east of Monmouth street as they may need in the con-

struction of said bridge, not to exceed the period of two years from the passage of this ordinance. Rates of toll.

SEC. 4. In consideration of the foregoing grant, the rates of toll over said bridge shall be as follows, viz: packages of one hundred tickets to foot passenges for one dollar to all persons applying for the same; one horse and dray, ten cents for a single crossing; one horse and express wagon, ten cents; one horse and buggy, fifteen cents.

SEC. 5. This ordinance shall take effect upon the Bridge Company's filing a written acceptance of the terms and conditions contained therein.

The foregoing is a true copy of the ordinance passed May 12, 1868.

SAMUEL CUMMINGS,
President City Council of the city of Newport.

Acceptance filed by company, May 18th, 1868.

A RESOLUTION to perfect our present railroad facilities and promote a Southern railroad connection, passed by the City Council of Cincinnati, Nov. 15, 1867. (See page 6, R. R. Pamphlet.)

That the railroad companies, aforesaid, which have or shall acquire the right to use said connection track, or one or more of them, upon the other declining, shall also have the privilege of extending said connection track by the most direct convenient route, and over any street, wharf, or other public ground of the city, to connect with any Southern railroad or railroads which may cross the Ohio river on the present Suspension Bridge, or any other bridge that may hereafter be built. And such Southern railroad company or companies may acquire a common and equal right of use of said connection track with the companies then entitled to use the same (subject, however, to said prior choice of time reserved to the original grantees) upon paying an equal proportion of its first cost. City gives R. R's right of way to bridge.

154 AN ACT to establish certain post-roads.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the bridge partially constructed across the Ohio River at Steubenville, in the State of Ohio, abutting on the Virginia shore of said river, is hereby declared to be a lawful structure: Provided, That when completed, if constructed without a draw, it shall leave an unobstructed headway in the channel of the river of not less than ninety feet above low-water mark, and such channel or water-way shall have an unobstructed width of not less than three hundred feet between the piers next to said channel or water-way, and one of the spans next adjoining thereto shall not be less than two hundred and twenty feet in length; or said bridge, if constructed with a draw, the same to be constructed under the limitations and conditions provided in the fourth section of this act. Steubenville Bridge.

SEC. 2. Be it further enacted, That the said bridge and Halliday Cove Railroad are hereby declared a public high-

Same a post-road.

way and an established post road for the purpose of transmission of mails of the United States, and that the Steubenville and Indiana Railroad Company, chartered by the legislature of the State of Ohio, and the Halliday Cove Railroad Company, chartered by the State of Virginia, or either of them, are authorized to complete, maintain, and operate said road and bridge when completed, as set forth in the preceding section, anything in any law or laws of the above-named States to the contrary notwithstanding.

SEC. 3. And be it further enacted, That it shall be lawful for any other railroad company or companies whose line or lines of road may now or shall hereafter be built to the Ohio River above the mouth of the Big Sandy River, in accordance with the terms of the charter or charters of such company or companies, to build a bridge across said river for the more perfect connection of any such roads, and for the passage of trains thereof, under the limitations and conditions hereafter provided.

R'ds can build bridges above the Big Sandy River.

SEC. 4. And be it further enacted, That any bridge 155 erected under the privileges of this act may, at the option of the company or companies building the same, be built either as a draw bridge, with a pivot or other form of draw, or with unbroken or continuous spans: Provided, That if the said bridge shall be made with continuous or unbroken spans, it shall not be of less elevation than ninety feet above low water mark over the channel of the said river, nor in any case less than forty feet above extreme high water, as understood at the point of location, measuring for such elevation to the bottom chord of the bridge. Nor shall the span of such bridge covering the main channel of the river be less than three hundred feet in length, with also one of the next adjoining spans of not less than two hundred and twenty feet in length, and the piers of said bridge shall be parallel with the current of the river as near as practicable: And provided also, That if any bridge built under this act shall be constructed as a draw-bridge, the same shall be constructed with a span over the main channel of the river, as understood at the time of the erection of the bridge, of not less than three hundred feet in length, and said span shall not be less than seventy feet above low-water mark, measuring to the bottom chord of the bridge, and one of the next adjoining spans shall not be less than two hundred and twenty feet in length; and also that there shall be a pivot draw constructed in every such bridge at an accessible and navigable point, with spans of not less than one hundred feet in length on each side of the central or first pier of the draw: And provided also, That said bridge shall always be opened promptly, upon reasonable signal, for the passage of boats whose construction may not, at the time, admit of their passing under the permanent spans of said bridge, except that said draw shall not be required to be opened when engines or trains are passing over said bridge, or when passenger trains are due; but in no case shall unnecessary delay occur in the opening of said draw after the passage of said engines or trains.

Kind of bridge.

Channel span.

SEC. 5. And be it further enacted, That any bridge or bridges erected under the provisions of this act shall be lawful structures, and shall be known and recognized as post-routes, upon which, also, no higher charge shall be made for the transmission over the same of the mails,
156 the troops, and the munitions of war of the United States, than the rate per mile which the company or companies erecting such bridge may from time to time receive on the balance of their line or lines for such services; and the officers and crews of all vessels, boats, or rafts navigating the said Ohio River are required to regulate the use of the said vessels, and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation, construction, or use of any of the bridges erected or legalized under the provision' of this act.

All bridges under this act are post-routes.

Approved July 14th, 1862.

JOINT RESOLUTION giving the assent of the United States to the construction of Newport and Cincinnati bridge.

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress be, and the same is hereby, given to the erection of a bridge over the Ohio River from the city of Cincinnati, Ohio, to the city of Newport, Kentucky, by the Newport and Cincinnati Bridge Company, a corporation chartered and organized under the laws of each of the States of Kentucky and Ohio: Provided, That said bridge is built with an unbroken or continuous span of not less than four hundred feet in the clear, from pier to pier, over the main channel of the river, and is built in all other respects in accordance with the conditions and limitations of an act, entitled "An act to establish certain post-roads," approved July fourteenth, eighteen hundred and sixty-two. That said bridge, when completed in the manner specified in this resolution, shall be deemed and taken to be a legal structure, and shall be a post road for the transmission of the mails of the United States; but Congress reserves the right to withdraw the assent hereby given in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this resolution, or to direct the necessary modifications and alterations of said bridge.

Approved March 3d, 1869.

AN ACT to protect bridges across the Ohio River.

SECTION 1. Be it enacted by the general assembly of the Commonwealth of Kentucky, That if any person shall wilfully burn or otherwise
157 destroy, or wilfully attempt to burn or destroy any toll bridge or any part thereof, erected or that may be erected across the Ohio River, within this Commonwealth, in whole or in part, he shall be deemed guilty of felony, and shall be imprisoned in the penitentiary not less than five nor more than twenty years.

SEC. 2. That if any person or persons shall forge or counterfeit any ticket or pass of any bridge company in this Commonwealth with intent to defraud such company or any individual, or shall knowingly have in his or her possession any such forged or counterfeit ticket or pass, with intent to use, sell, or otherwise dispose of the same, such person shall be deemed guilty of a felony, and upon conviction thereof shall be pun-

ished by confinement in the penitentiary for a period of not less than one nor more than two years.

SEC. 3. That if any person shall wilfully injure such bridges or any part thereof, or the approaches thereto, or without authority take up or remove the paving or any part of it, or the planks in the bridge floor, or the tracks or rails, or place any obstructions on the bridge or upon the approaches, or wilfully impede any foot passengers or vehicle or stock in crossing such bridge, without the assent or contrary to the rules of the company or owner of such bridge, or the keeper thereof, he shall be deemed guilty of a misdemeanor, and shall be fined at the discretion of the jury, and imprisoned in the county jail not exceeding one year.

SEC. 4. If any person shall wilfully destroy or deface any sign, notice, card, or table of rules, or rates posted and put up at said bridge by the company, owner, or keeper, for the information of the public, or shall, without right or authority, alter, take down, or remove the same, he shall be fined not less than ten nor more than fifty dollars, before the mayor or police judge of a city, county judge, or justice of the peace, and shall be imprisoned until the fine be paid.

SEC. 5. That if any person shall, with intent to defraud the company or owner of such bridge, fail or refuse to pay the toll required when crossing, or shall attempt to evade the payment thereof, he shall be fined from five to ten dollars.

SEC. 6. That all bridge companies and owners are hereby invested with full power and authority to make and enforce any rule or regulations not inconsistent with their charters or the laws of this State, which shall be deemed necessary or requisite to preserve and protect their property and collect their tolls, and they may prevent any person from crossing such bridge, on foot or by riding or driving any team or vehicle, or from driving any stock, who fails to pay the regular fare when demanded, and the police or watchman of such bridge shall have, and are hereby invested with all the power and authority of policemen of cities, and may arrest any violator of the law or the rules of such bridge company, without any warrant, and take them before the proper civil authority, to be dealt with according to law.

SEC. 7. That if any person shall ride or drive any team, or wilfully drive any stock across or upon said bridge faster than a walk, such person shall, upon conviction before a justice of the peace, or police judge, be fined from five to ten dollars.

SEC. 8. That when any company or owner of such bridge shall issue and sell tickets in commutation of fare for the convenience of, and to favor the public, and those who frequently cross such bridge, or shall sell packages of tickets at a reduced rate below single fares, it shall not be lawful for any person to make traffic of the same, nor to resell such tickets at the same or at a less rate than the company charge for single fares, and any person violating this section shall be fined from five to ten dollars for each offense.

SEC. 9. That all fines imposed by virtue of this act, in amounts less than one hundred dollars, shall be imposed and enforced as provided in section third, shall be prosecuted for in the name of the Commonwealth, and shall be for the use of the common school fund of the city or town in which such bridge shall be located.

SEC. 10. This act shall take effect from and after its passage.

Approved March 4, 1867.

AN ACT for the protection of bridges across the Ohio River.

SECTION 1. Be it enacted by the general assembly of the State of Ohio, That if any person shall wilfully burn or otherwise destroy, or shall wilfully attempt to burn or destroy, any toll bridge or any part thereof, erected or that hereafter may be erected across the Ohio River, he shall be deemed guilty of felony, and shall be imprisoned in the penitentiary not less than three nor more then ten years.

SEC. 2. That if any person shall willfully injure such bridge or any part thereof, or the approach thereto, or, without authority, take up or remove the paving or any part of it, or the planks in the bridge floor, or the tracks or rails, or place any obstruction upon the bridge or upon said approach, or wilfully impede any foot passengers, or
159 vehicles, or live stock in crossing such bridge, without the assent of the company or owner of such bridge or the keeper thereof, he shall be deemed guilty of a misdemeanor, and shall be fined at the discretion of the court, and imprisoned in the county jail not exceeding one year.

SEC. 3. If any person shall wilfully destroy or deface any sign, notice, card or table of rules or rates posted and put up at said bridge by the company or owner or keeper for the information of the public, or shall without authority alter, take down or remove the same, he shall be fined in any sum not less than ten nor more than fifty dollars, before any justice of the peace or court of record having proper jurisdiction.

SEC. 4. That if any person shall, with the intent to defraud the company or owner of such bridge, fail or refuse to pay the toll required when crossing, or shall attempt to evade the payment thereof, he shall be fined in any sum not less than five nor more than twenty dollars.

SEC. 5. That all bridge companies and owners are hereby invested with full power and authority to make and enforce any rule or regulation which shall be deemed necessary or requisite to preserve or protect their property and collect their tolls, and they may prevent any person from crossing such bridge on foot or by riding or driving any team or vehicle, or from driving any stock, who fails to pay the regular fare when demanded; and the police or watchmen of said bridge shall have and *and* are hereby endowed with all the power and authority of policemen of cities, and may arrest any person who violates the law or the rules of such bridge company, without warrant, at or upon such bridge, and take him before the proper civil authority to be dealt with according to law.

SEC. 6. That if any person shall ride or drive any team across or upon said bridge at a gait faster than a walk, such person shall be fined in a sum of not less than five nor more than ten dollars.

SEC. 7. That when any company or owner of such bridge shall issue and sell tickets in commutation of fare for the convenience of and to favor the public and those who frequently cross such bridge, or shall sell packages of tickets at reduced rate below single fares, it shall not be lawful for any person to make traffic of the same, nor to resell such tickets at the same or at a less rate than the company charge for single fares, and any person violating this section shall be fined five dollars for each offense.

SEC. 8. That if any person shall forge or counterfeit any check, tickets, order or pass, written or printed, issued or purporting to
160 have been issued by said bridge company or owner or shall knowingly have such forged or counterfeit check, ticket or order in possession with intent to defraud the said company or owner, he shall,

approval. And in the event of the bridge company making the changes provided for in this act, it shall be lawful for said company, after they shall have made the changes in said bridge, and the approaches thereto, as herein provided, to file their bill in equity, against the United States in the circuit court of the United States for the southern district of Ohio, and full jurisdiction is hereby conferred upon said court to determine: First, whether the bridge, according to the plans on which it has progressed, at the passage of this act, has been constructed so as to substantially comply with the provisions of law relating thereto; and, second, the liability of the United States, if any there be, to the said company, by reason of the changes by this act required to be made, and if the said court shall determine that the United States is so liable, and that the said bridge was so being built, then the said court shall further ascertain and determine the amount of the actual and necessary cost and expenditures reasonably required to be incurred in making the changes in the said bridge and its approaches, as hereby authorized or required, in excess of the cost of building said bridge and approaches according to the plan proposed before the changes required by this act to be made.

162 And the said court is hereby further authorized and required to proceed therein to final decree, as in other cases in equity. And it shall be lawful for either party to the said suit to appeal from the final decree of the said circuit court to the Supreme Court of the United States, as in other cases, and the Supreme Court shall thereupon proceed to hear and determine the said case, and make a final decree therein; and thereupon, if such decree shall be in favor of said company, the Secretary of the Treasury of the United States shall, out of any moneys in the Treasury not otherwise appropriated, pay to the said company such sum of money as shall, by the said Supreme Court, be so decreed to be paid to the said company; provided, nevertheless, that no money shall be paid by the Secretary of the Treasury to the said company until the Supreme Court of the United States, upon appeal taken as aforesaid, shall render a final decree in the case in favor of said company.

Approved March 3d, 1871.

BY-LAWS OF THE NEWPORT AND CINCINNATI BRIDGE COMPANY.

Officers.

ARTICLE I. A vice-president—who shall be a director—a secretary, and a treasurer shall be elected at the first meeting after the election of the board, or as soon thereafter as may be convenient. The board may then, or at any time, elect a consulting engineer, or engineer, and a superintendent. Vacancies in any of the offices may be filled at any meeting during the year. Nothing in this article to be construed as preventing any two or more of said offices being filled by the same person.

Meetings.

ART. 2. The regular meetings of the board of directors shall be on the second Tuesday of January and July; but special meetings may be called by the president whenever he may deem it necessary, by giving not less than twenty-four hours' notice, the notice to be served personally, or sent to the dwelling or place of business of the member, or de-

board; to keep regular books and accounts of all receipts and disbursements made, giving bond and security approved by the board in such sum as the board may designate for the faithful performance of his duties. The books and accounts shall be at all times subject to examination of the board of directors of the company or any member thereof.

Salaries.

ART. 11. All appointments of officers shall be by ballot or by unanimous consent, viva voce, and a majority of the votes of the whole number of directors shall be necessary to constitute an appointment and to fix their salary. All officers elected by the board shall be subject to removal at any time by a vote of the majority of the directors, and the salary of all officers, agents, and employés shall be subject to modification at any time.

Finance committee.

ART. 12. There shall be a finance committee, consisting of the president and one or more directors, whose duties and authority shall be to inquire, advise, and consult with the executive officers in all matters relating to the finances of the company; to advise ways and means for maintaining the credit, discharging the obligations, and carrying out the plans and undertakings of the company; and to report to the board from time to time any matter which they may deem material for their action or information, and to discharge such other duties relating to the premises as the board may from time to time direct.

Other committees.

ART. 13. The president shall appoint such other committees as may be ordered by the board, who may from time to time prescribe their duties.

Stockholders.

ART. 14. A meeting of the stockholders shall be held at the office of the company on the second Tuesday in January annually, for the election of a president and directors, and for such other business as may come before the meeting; and special meetings of the stock-
165 holders may be called by the president at any time, or upon the written request of the holders of one-third of the capital stock, by giving notice of the time and place of meeting in some newspaper of general circulation in Cincinnati at least ten days before the time of holding such meeting.

ART. 15. No person shall be eligible to the office of director who is not at the time a stockholder in the company. Notice of the annual meeting shall be published in some newspaper of general circulation in the city of Cincinnati at least ten days before the holding of such election.

The clerk of elections shall notify each of the persons elected, whose duty it shall be to notify the secretary within thirty days after of his acceptance of the office, and a failure to do so may be declared by the board a refusal to serve, and upon such declaration by the board being entered on their minutes, the board may proceed to fill the vacancy.

A. In 1868 I was president of the Keystone Bridge Company; I assumed that position in 1867, and have held it continuously ever since. The Keystone Bridge Company is a company formed under the laws of the State of Pennsylvania for the purpose of building bridges.

Q. 3. State what connection, if any, the Keystone Bridge Company had with the building of the Newport and Cincinnati bridge, at Cincinnati, Ohio, and what duties, if any, you personally performed in reference to it.

A. The Keystone Bridge Company were the contractors for the manufacture and erection of the iron superstructure of the Newport and Cincinnati bridge; I was officially engaged by the parties who constructed that bridge, at first as chief engineer of the bridge, and later as chief engineer of iron superstructure. After Mr. George B. Roberts' return to Philadelphia, and after Mr. John C. Wilson had been sent to Cincinnati to make examination and location, I was relieved at my request of charge of the superstructure, except preparation of plans for the same, and of all matters except charge of iron superstructure. By the term iron superstructure, I include floor, foundation, and everything above the piers.

167 Q. 4. Was the contract between the bridge company and your company in writing? And, if so, please produce and annex a copy to your deposition.

A. It was; the original is at Pittsburgh, and I have a letter-press copy.

A copy of said contract is hereto attached and marked Exhibit H. C. S., A.

Q. 5. Please state what was done under this contract.

A. No work was ever done to my knowledge under this contract, except a contract made for the iron. I mean to say that this contract contemplated the erection of a bridge different from the one which was erected. The length of spans, elevation of the bridge, were changed before the construction of any part was commenced; the price stipulated in this contract is in lump sums for certain specified lengths of spans. Before commencing the construction of the bridge, careful estimates were made to determine the quantity of and rate for the iron work in the spans contemplated in the contract. After determining at what rate for materials, workmanship, and erection the spans mentioned in the contract would amount to the lump sum therein specified, I obtained a basis from which to estimate the modified plans, it being understood that any changes involved in the work should be made at the same rates for materials and workmanship as were contemplated in the original contract; in other respects we were bound by the general conditions of the contract. There was no subsequent writing. George C. Francisens was the agent, as I understood, of the parties who projected the bridge; he represented the bridge company.

Q. 6. Describe the bridge that was projected and which was contemplated by the original contract of October 16th, 1868.

A. It contemplated a bridge with a railroad track in the centre, 13 feet in the clear between the trusses; there was a roadway on each side 10 feet wide in the clear; the elevation of the channel span was about 109 feet above low-water; the spans and length of bridge, &c., are specified in the contract with the Keystone Bridge Company.

Q. 7. When was change of plan determined upon, and for what reason?

A. Change of plan was determined upon in a conference between Messrs. J. E. Thomson, T. A. Scott, G. B. Roberts, myself and others at

Cincinnati, at the Burnet House, I think in November, 1868. On an examination of the preliminary location of a straight bridge terminating in Butler street, near Third, Cincinnati, involving a switch track to connect with the Little Miami Railroad, it was deemed impracticable to operate the railroad. It was then determined to locate a curve from the Little Miami depot across the Niles property, and intersecting the line of the bridge near the river front, so as to obtain direct connection between the Little Miami Railroad and the main line of the bridge across the river. On a careful examination of the respective elevations, we ascertained we could not reach the elevation of the channel span without employing a grade of two feet per one hundred feet; we also found serious difficulties in arranging for the descent of the roadways from the channel span to the approaches. It was therefore determined at this interview, or soon after, to place the grade 75 feet above low water, and introduce a pivot draw bridge in addition to the long span over the channel.

Q. 8. Please state what was done toward the construction of a draw bridge?

A. I furnished the plans for the substructure, consisting of a pivot pier and wooden cells to be used as a fender. I believe that these were constructed. The Keystone Bridge Company also provided the pivot-center on which the iron superstructure was to be rotated.

Q. 9. Up to what time did work proceed under these plans, and why was it suspended?

A. It proceeded until some time in the winter of 1871, when it was suspended by direction of Mr. G. R. Roberts, in consequence, I presume, of the act of Congress of March 3, 1871. I know of no other reason.

I made a careful estimate immediately after the suspension of the work, and reported the same March 14, 1871, to George B. Roberts; I think he was president of the bridge company then; showing the work done under our contract for the superstructure of the low grade bridge, the contract price for the bridge completed on that plan, and the new work to be done to raise the bridge to a gradient of a hundred feet above low water. I have a letter press copy of this report in my hand.

Q. 10. What would have been the cost of the iron superstructure of the low grade bridge completed?

A. $502,473 for the work embraced in the contract with the Keystone Bridge Company. I was inaccurate in stating that the contract embraced everything above the piers; there were lamps, fencing, alterations, toll houses, stairs, etc., not included in that contract.

Q. 11. What was the cost of the iron superstructure of the high bridge as completed?

A. The cost of the bridge embraced in the Keystone Bridge Company's contract was $669,412.18. I know that lamps were placed on the bridge, gas pipe, railing, and fencing, also toll houses and stairs. The lamps were ordered by myself; I do not know the cost. I also know Mr. Roberts paid Mr. Piper $500 for special services, he remaining at Cincinnati at a critical period, when there was an ice flood in the river.

Q. 12. Please state in detail the changes which were made necessary in the iron superstructure in changing the bridge from a draw, as commenced, to a high bridge as completed, giving the cost involved in the changes.

A. I present (and the same is annexed hereto, and marked Exhibit H. C. S.) a copy of the statement made by me to Mr. Roberts, March 14, 1871, showing first the amounts to which we would be entitled under

our contracts upon each span; second, the amount earned upon the work to that date; third the cost of the necessary changes.

Spans A and B were being constructed as through bridges, and I was obliged to calculate the cost of taking them down and remodelling them so as to use them as deck bridges. The changes required the use of lateral and diagonal rods of different lengths and different methods of attaching the same. C and D were wedge shape spans. The change of grade involved different arrangement of floor girders for the railway track and the cantilever for supporting the roadways. On span No. 1 of the river bridge, some extra stringers and struts were required, and the channel span No. 2 extra stringers, struts and change in some of the cantilevers was required. In span No. 3 some extra stringers and new struts were required. A fixed span, No. 4, was substituted for the pivot span originally designed. Spans 5 and 6 had been erected; it was necessary to elevate these spans bodily to a higher elevation and a different grade, and suspend the roadway floor some distance below the lower chord.

Spans over Front street, Newport, had to be elevated to a different grade, and the roadway suspended below. The pivot center had been furnished for the pivot bridge. Span over Market street, Newport, required no change involving additional cost; the item of spikes, bolts, pitch, etc., was derived from my estimates of original cost, and are applicable to both structures. In place of the spans A and B we erected a through bridge of greater span; for the pier stipulated in the report, an additional roadway span was required by revised plan, over Front street, Cincinnati; three additional deck spans on the curve on the north approach, and a span over Eggleston avenue was to be furnished at rates specified in the report. The bridge being elevated to a grade 25 feet higher, involved additional cost for false works. Nearly all the working drawings had to be revised, involving additional cost for
170 new revised drawings of all the work. The estimate of all these changes, and the price received by the Keystone Bridge Company for the furnished work, appear in the above report.

Q. 13. What amount of money was paid the Keystone Bridge Company up to March 3rd, 1871?

A. I cannot state it accurately. The estimate January 31st, 1871, including the 10 per cent. which the company was entitled to retain, was $255,910. The estimate March 1st, including the 10 per cent., as above, was $275,830.

Q. 14. What have you to say as to the relative utility and durability of the bridge as projected and the bridge as completed?

A. I believe the bridge as completed to be more difficult to operate, and therefore less useful, than the bridge as originally designed; and I believe that the steep grades and heavier engines involved by the higher elevation of the bridge as completed, will cause more rapid deterioration.

Cross-examination:

Q. 15. When was the project of constructing that bridge originated; and were you connected with the project from the beginning?

A. The first intimation I had of it was from S. C. Franciscus, about July 2nd, 1868, to repair to Cincinnati, examine the location, and make a report on plans and location of a bridge.

Q. 16. Whom did he represent?

A. I do not know positively. He appeared to be acting for Mr. J. Edgar Thomson, Mr. Gaither, Mr. Thomas A. Scott, Mr. W. H. Clem-

ens, and Mr. Woodward appeared to have an interest. These parties were in consultation here or in Cincinnati.

Q. 17. What was the employment of Franciscus?

A. He was general agent of the Pennsylvania Railroad located in West Philadelphia, and made contracts for freight, &c.

Q. 18. Was he at that time, or had he been previously engaged in the business of bridge building?

A. Not to my knowledge.

Q. 19. What did you do under the directions given you by Franciscus?

A. I repaired to Cincinnati where I met Gen'l St. John, Mr. Woodward, and I believe Mr. Clemens; St. John was an engineer who had previously examined the location for the bridge. I examined the proposed site of the bridge with him, and obtained plans of the locality and his profile of the soundings, and such other information as he was able to furnish, from which I prepared, on my return to Philadel-
171 phia, a preliminary plan and estimate; the report and estimates were submitted about August 25th, 1868.

Q. 20. Were the directions given to you in writing, or merely verbal?

A. Verbal; my estimates were in writing; I presented them to the meeting and made verbal report and explanations of them; I submitted in connection with the estimates written specifications.

Q. 21. Did you submit with this any drawing?

A. Yes, sir; I submitted a general elevation, cross-section and plan.

Q. 22. What disposition was made by the meeting of your estimate and plan, and when was it, if at all, adopted or rejected, in whole or in part?

A. The cost of the bridge was deemed too great, and Mr. Thomson desired me to prepare estimates on a modified plan, employing two trusses instead of three, placing the railway between the trusses and supporting two single track roadways on cantilevers projecting outside the trusses. The plan I presented provided for three trusses, the middle truss separating the single track railroad from a double track roadway; this was a much more expensive plan than the one he suggested, and upon which he asked my estimates to be made.

Q. 23. What hight of bridge did your plan as presented contemplate; did it include a draw or not?

A. It intended to afford a clear hight of 100 feet above low water at the channel span, and did not include a draw.

Q. 24. Did you proceed to make plans and estimates in pursuance of the directions given you by Mr. Thomson, and if so, in what respect did they differ, and to what extent in plan and amount, from the plans and estimates previously made?

A. I can find no record of any new plans made at that time; an estimate was made on the plan suggested by Mr. Thomson, slightly modifying the spans as given in the first plan. The original estimate of the cost of the bridge was $1,675,189. I made an intermediate estimate for a railway track only, for $1,099,845.50; this was submitted at the same time as the original estimate. The estimate on the plan suggested by Mr. Thomson, of single roadway and double roadway, was $1,249,471.75. These estimates were made before any borings were made in the river.

Q. 25. Did the plan suggested by Mr. Thomson upon which you made the second estimates, contemplate any other change in the plans you submitted than what you have stated as to the number of trusses and arrangement of the ways, and the consequent reduction in the length of the piers?

172 A. It was understood that these estimates were merely for purposes of comparison to arrive at the most economical method for the construction of the bridge, subject to revision or a more careful examination of the locality. They were all confined to same locality, hight of bridge and length of structure, and the data obtained on my first visit to Cincinnati from Gen. St. John, which is all I had to work on. Mr. Thomson's suggestion referred to no other change in the original plan and estimates I submitted, except as to change in number of trusses, arrangement of ways, and reduction in the length of the piers.

Q. 26. When were the estimates submitted upon the plan suggested by Mr. Thomson?

A. About August 25th, 1868.

Q. 27. What further plans and estimates were made before the making of the contracts with Franciscus, Smith & Co., if any?

A. There were no other plans or estimates made previous to the 8th or 9th of October, the date of contracts with Franciscus, Smith & Co., as stated in the pleadings. The Keystone Bridge Co.'s contract was a flexible contract, admitting of change of plan. It was understood that this was not a final location, which was to be developed on a more thorough examination. All this is not expressed in the Keystone Bridge Co.'s contract. It was understood, but not expressed in the contract, that there might be a change in location. Provision for a change of spans is made in the Keystone Bridge Co.'s contract.

Q. 28. Were you a party to or present at any of the negotiations or conversations with Smith & Co., Franciscus, or the Keystone Bridge Co., that preceded and led to the contract with them finally made?

A. I was asked, as representing the Keystone Bridge Co., if we would erect the superstructure at a fixed price—slightly below my estimate for the same. I finally consented to do it at the price named in the contract, viz., $575,000. This is very slightly below the estimate. I do not recollect any conversations in reference to the contract for substructure at which Mr. Smith was present. I do not know of any meetings at which he was present previous to the time his contract was executed.

Q. 29. Was the contract with the Keystone Bridge Co. founded upon the plans you made and have heretofore referred to?

A. They were founded on the estimates. There was no plan made of this bridge as specified in this contract.

Q. 30. Upon what, then, were your estimates founded, if there was not some plan of a bridge to be constructed then contemplated?

173 A. We had the profile of elevation, ground plan on the original plan that I made, and from these data, and by assuming different plans and different designs for superstructure, I made the computations and estimates for the bridge referred to in the contract. From want of time I was unable to prepare plans.

Q. 31. Does the contract with the Keystone Bridge Co. for superstructure contemplate a draw or pivot span?

A. It does not.

Q. 32. When was the contract made with the Keystone Bridge Co. for the construction of a draw or pivot span?

A. There was never any written contract made by the Keystone Bridge or modification of contract of October, 1868. We were simply ordered to modify our plans from the high to a low bridge. As engineer of the Bridge Co., I revised the plans of superstructure and made careful estimates of the revised plan at the same rates for materials and workmanship as were contemplated in the original contract.

Q. 33. At what time was the Keystone Bridge Co. notified by Fran-

ciscus or the Newport Bridge Co., to construct a pivot span in place of stationary span?

A. Mr. Roberts had, I think, superseded Franciscus in the management of the matter, and gave me instructions; I am not positive if they were in writing or not. I may be able to find a letter. This was after a second visit to Cincinnati with Mr. Thomson, Scott and Roberts, I think in November, 1868.

Q. 34. At what time was the change from a high to a low bridge, with pivot draw, and the plans thereof completed, and the necessary arrangements with contractors of the bridge finally made, as nearly as you can state?

A. The plans were matured in December, 1868, and so far as the Keystone Br'dge Co. was concerned, they were then directed to make the necessary change in the superstructure. I made some working plans for the superstructure according to the change, and sent them to Mr. Wilson, in March, 1869. I know nothing at all of the arrangement with the contractor for masonry, nor when they were finally made.

Q. 35. Were you not at that time acting in the two-fold capacity of agent of the Keystone Co., and also of engineer of the Bridge Company?

A. I was, as previously stated.

Q. 36. Had you any knowledge of bill or resolution pending before Congress during the winter of 1868 or 1869, in reference to the plan of this bridge, and had you any conversations with the officers or agents of the Bridge Company in reference to that subject?

174 A. I do not recollect anything about the bill or any conversations in reference to any matters regarding legislation.

J. H. LINVILLE.

Adjourned to Tuesday, July 28th, 1875, at 9 o'clock.

July 28th, 1875, 9 a. m. Present, Wm. M. Ramsey, esq., for Newport and Cincinnati Bridge Co.; Warner M. Bateman, esq., U. S. district attorney.

The cross-examination of Mr. Linville having been for the time suspended,

JOHN C. WILSON, a witness produced on behalf of the complainant, being duly sworn, said:

Q. 1. Please state if you have testified in this case heretofore, and if you desire to make any correction; and, if so, what?

A. I have testified in this case heretofore, and desire to correct my reply to interrogatory No. 144½ of that testimony, as to the manner of arriving at the sum mentioned by me as the cost of property used for bridge purposes on the east side of Butler street. Examinations made since that testimony was given show the amount stated was arrived at as follows: The consideration for lot 99 feet by 25 feet, on the corner of Front and Butler streets, purchased from James and William Thompson was $19,000; the examination of title and other expenses connected with the purchase were $134.50; amount of interest paid on deferred payments of consideration $905.00, making the total expenditure for this lot $20,039.50. On the east side of this lot a portion of a lot, 140 feet by 99 feet, was used for bridge purposes; a lease upon this second lot was purchased from W. C. Davis in connection with a lease upon the lot to the north of both of these, the consideration for the assignment of the two leases being $35,000, and the proportion of consid-

eration for the Front street property being $7,503.68; the expenses attendant upon the purchase of this lease were $10.50; the lot was subject to an annual rental of $500, to be paid by the bridge company to the heirs of Stephen Wheeler until Nov. 1st, 1875, at which time the lease would expire.

This lease included the privilege of purchasing the property at the expiration of the lease for the sum of $19,600. The purchase of the lease was made May 1st, 1869, and the cost of the property to the bridge company on January 1st, 1873, was as follows:

175	Consideration for assignment	$7,503	68
	Expenses of purchase	10	50
	Rent, May 1st, 1869, to Nov. 1st, 1875, 6½ years at $500	$3,250	00
	Interest on rent 3½ years, at 6 per cent	633	75
	Consideration payable Nov. 1st, 1875	19,600	00
		$23,483	75
	This amount discounted January 1st, 1873, 2 years and 10 months at 6 per cent	$20,071	58
	Cost of whole lot January 1st, 1875	27,585	76

Fourteen feet of the front of this lot, or one-tenth part of the whole lot, was used for part of the approach to the bridge; the cost of this part being $2,758.58. This, together with the cost of Thompson lot, as before stated, makes the cost of property on northeast corner of Front and Butler streets, fronting 99 feet on Butler street, and of the depth of 39 feet on Front street, $22,798.08, or 230\frac{2836}{10000}$ per lineal foot of Butler street front. In my computation I have called this price $230.25, which applied to the 331 feet front on Butler street, between Front street and Pearl street, gives the amount $76,212.75, the cost as stated in the answers to interrogatory No. 144½ of the testimony heretofore given by me.

Cross-examined:

Q. Did you furnish the data for the answer filed by the Newport Bridge Company in the case of Smith & Co. vs. it in the court of common pleas of Hamilton County, Ohio, No. 39,415?

(Objected to as a question of cross-examination.)

A. I did furnish these data.

Q. Under whose direction and on whose behalf did you furnish such data?

A. As engineer in charge of the Newport and Cincinnati bridge, I furnished the data at the request of the solicitor of the company, on behalf of the bridge company. I do not know that I had positive instructions to do so from the bridge company, it was a part of my business.

(Counsels agree that questions objectionable as in cross-examination, and their answers, may be admitted as testimony taken in behalf of defendant, subject to objections as to its competency.)

Q. 4. At what time were you first advised, as engineer in charge of the work, of the plans determined upon after November, 1868, by the company?

176 A. I received the plans in March, 1869; having been advised some time previously that the drawing of the plans was in progress.

Q. 5. Do you know when Smith & Company were first notified of the

change and of the new plan adopted, and by whom that notice was served or given?

A. Immediately after the receipt of the plans by me, in March, 1869, I exhibited them to George A. Smith, of the firm of Smith & Company; this I believe to be the only notice given them.

Q. 6. Will you please to furnish a copy of the letter to you transmitting the new plans from the officers or agent of the company?

A. I have not that letter at hand now; I may be able to find it on my return home, and, if so, will furnish it as part of this answer.

Q. 7. Please append to this question also a copy of the letter, if any, received from Smith or Smith & Co. in reference to such plan after notice?

A. I received a letter from Smith & Co. on that subject, a copy of which is before me. It is as follows:

CINCINNATI, *April* 3, 1869.

J. B. WILSON, Esq.,

Engineer Cincinnati and Newport Bridge Company:

DEAR SIR: After examining the new plans for the masonry of the Newport and Cincinnati bridge, shown me this day, I wish to inform you that I cannot afford to do the work without an increase of compensation over that named in my contract. In the plans upon which I bid there was a much larger amount of masonry in both the river piers and the approaches, and no brick-work. Brick-work has now to a large extent been substituted for stone, the stone-work greatly reduced in quantity, and the cutting increased and elaborated, thereby much increasing the cost. The great reduction in the amount and change in the character of the work in the approaches is particularly hard on me, as on this portion of the work I had expected to make my profits; the river work, even on the original plan, affording no margin at the price at which it was taken.

(Signed) GEORGE A. SMITH.

Q. 8. Had you any negotiations in behalf of the bridge company with Smith & Company, with reference to the price of the new work or variation of contract with him in consequence of the new plan; and, if so, what were they?

177 A. I made no negotiation with Mr. Smith, though the matter was frequently talked about by Smith and myself. The letter to which I have before referred was forwarded by me to G. S. Roberts, agent for G. C. Franciscus, and a meeting was held in Cincinnati on or about the 15th day of April, 1869, at which Mr. Roberts and various other parties interested in the bridge, also George A. Smith and myself, were present. At this meeting Smith reiterated the complaints of his letter, and it was verbally agreed that if his complaint as to the increase of the cost of the work to him should prove to be correct at the completion of the work, a compensation should be allowed him above the contract price; the amount of said compensation, if any, should be determined by J. Edgar Thomson; but that the price per perch as named in the contract should remain unaltered. It was further agreed that a portion of the ornamental work as shown on the plan should be omitted, and also that the brick masonry should be paid for at the rate of $8.25 per perch of twenty-five cubic feet, the bridge company to furnish the bricks to Smith & Company on barges, or at points accessible to the work, free of charge. On the 27th of April, 1869, the following proposal for building the brick-work was received by me.

APRIL 27TH, 1869.

GEO. B. ROBERTS, Esq., *Agent:*

SIR: I propose to build the brick-work in the approaches of the Newport and Cincinnati bridge, according to the plans and specifications and under the instructions and to the satisfaction of the engineer in charge of the work, for the price of eight 25-100 dollars per perch of 25 cubic feet; the bricks to be furnished me, free of all expense or charges, at points accessible to the work.

Yours, respectfully,

(Signed) GEO. A. SMITH.

This proposal was forwarded by me to G. B. Roberts, agent, was accepted by him, and Smith & Co. were notified of its acceptance. At this meeting, above referred to, there also arose a question as to the purchase of machinery for the construction of the foundations, Smith & Co. being unwilling to incur the outlay requisite for that purpose. It was verbally agreed that Franciscus should furnish at his expense two engines and as many boats as should be necessary to do the work upon the foundations, and that I, as engineer in charge, should give my assistance to the contractors in this work.

Q. 9. In what particulars and upon what grounds did Smith & Co. then claim additional compensation, and for what amounts was such claim made?

178 A. George A. Smith, in conversation with me, claimed that his original proposal for building the masonry of the bridge was predicated upon a plan for a high bridge, showing greater thickness of piers and stone retaining walls for supporting the approaches; these walls, as shown on the preliminary plan, were assumed by him as intended to be built of solid masonry 14 feet or more in thickness. The substitution of brick arches instead of these retaining walls, and the reduced thickness of the piers he complained would greatly reduce the profitable part of the masonry, leaving the unprofitable part nearly the same in quantity as was contemplated by him in connection with the preliminary plan. No amount of additional compensation was mentioned by him; I have no recollection of his having made any proposal as to what the increase of price should be.

Q. 10. Did or did not Mr. Thomson, and other agents of the bridge company with him, agree that he should receive an increased price as a part of the contract or modification thereof?

A. No increase of compensation was agreed upon other than that I have already mentioned.

Q. 11. Do I understand you, then, to say that the price to be paid for the work done should be left open to be fixed by Mr. Thomson after it should be completed?

A. I did not so understand the agreement; my understanding was that the prices per perch named in the contract should remain unaltered and should be the prices to be paid for the work, the bridge company claiming that the diminution in hight of the masonry was an equivalent for the reduction of thickness, but they assented to give to Mr. Smith a bonus or additional compensation for his work, if, after the masonry had been completed, it should be demonstrated that it had cost more per perch than it would have cost to build a high bridge, as claimed by Smith & Co.; the amount of such bonus to be determined by J. Edgar Thomson when all the facts should be laid before him on the completion of the work.

Q. 12. Were there any other rules or considerations agreed upon as governing Mr. Thomson in his allowance of additional compensation than those you have stated, viz, the consequences arising from the alleged change from a high to a low bridge?

A. The matter to be determined by Thomson was whether the contractors incurred any losses or suffered any diminution of profits by reason of the adoption of the plans then under consideration; and, if so, what was the amount so lost by them? I know of no allowance to be made on other grounds than this.

Q. 13. Was the bridge, as finally built, different in style or expensiveness of work and material from that alleged by Smith & Co. to have been contemplated under their original contract; and, if so, in what respect?

179 A. The bridge masonry as finally built by Smith & Co. was in some respects more expensive than that originally contemplated by them. The coping upon the piers was of greater thickness than was contemplated by them. The lamp pedestals of stone were placed upon the approaches to the bridge. The substitution of brick arches for stone retaining walls involved the use of askew backs, and entailed upon them an additional expense for stone-cutting, and the piers having been built of less thickness than was contemplated by Smith & Co., that portion of the work was rendered less profitable to them by reason of there being a larger quantity of cut-stone face-work in proportion to the total amount of perches contained in them. I have estimated the additional expense of the foregoing items as follows: For additional coping upon the piers, about $1,500; pedestals for lamp posts, about $600; and for askew backs, about $1,070. I have made no estimate of the increase of cost of pier masonry on account of the diminution of thickness, deeming that a question to be determined by Mr. Thomson.

Q. 14. What do you mean by the expression increase of cost? Is the cost of face work increased in consequence of the reduction of the filling?

A. By increase of cost I mean the cost per perch of the pier as built contrasted with cost per perch of a pier of larger dimensions without making any distinction between face work and backing. In the one case the proportion of expensive face work would be greater than in the other, thus rendering the cost per perch of the smaller pier greater than that of the larger. The cost per perch of face work would not be increased, but the relative quantity of it would be increased.

Q. 15. State whether or not the increase of cost that you have specified in consequence of the coping, askew backs, brick masonry, and lamp pedestals has been actually allowed to Smith & Co., and is embraced in paragraph 21, of the original bill, in this cause.

A. The amounts mentioned were allowed by me to Smith & Co., in the statement of final estimate of work done by them and amount due thereupon, the work so specified being regarded by me as common to the bridge intended to be built by the bridge company and that actually built by them in accordance with the bill of March 3rd, 1871, and is not included in paragraph No. 21 of complainant's bill, or any part of complainant's bill.

Q. 16. Smith & Co. claim as part of their damages the extra
180 cost of night and Sunday work. State what occasioned that extra cost, and whether it occurred subsequent or previously to the change ordered by the act of Congress of March, 1871.

A. The greater part, if not the whole, of this night and Sunday work was performed in the autumn of 1870. It was occasioned by the earnest

effort to complete the masonry before the fall freshets should come to interfere with the erection of the superstructure.

Q. 17. They also claim for damages in being compelled to recut and change the batter of the limestone work in the ice breakers; was there any change made in the ice breakers of this or any other work, except such as was made in the masonry taken down after the act of 1871, and included in the stone sold to them?

A. I have no recollection of any change in the batter of the ice breakers having been made. After the act of March, 1871, the upper portion of the piers were taken down and rebuilt to the hight required by that act; the batter of the masonry so rebuilt was changed to suit the new hight required. Smith & Co. were compensated for this change of batter by the low price at which the stones torn down were given to them to be reused by them and subsequently measured and paid for as if the new masonry was composed of entirely new material.

Q. 18. State whether or not there was any increase of dowelling required in the masonry in consequence of the change ordered by the act of Congress of March, 1871.

A. No increase of dowelling was necessitated by this change.

Q. 19. Were the approaches to the bridge shortened in consequence of the act of Congress, and the amount of masonry reduced?

A. No, sir.

Q. 20. Was the hight of the piers in the approaches reduced in consequence of that act?

A. There was no reduction in the hight of the piers of approaches in consequence of the act of Congress.

Q. 21. Was there any substitution of brick masonry for stone masonry, in consequence of the act of Congress?

A. One stone pier was removed and replaced by brick-work, and a much larger stone pier was built in a different place at the south side of Front street, Cincinnati.

Q. 22. Were there any brick arches substituted for retaining walls in consequence of that act?

A. No, sir.

Q. 23. Were there any changes made in the brick-work in consequence of that act that was not allowed for and included in the statement of items contained in paragraph 21 of the original bill herein?

181 A. No, sir.

Q. 24. Was there any change in the masonry in approaches upon the Kentucky side of the river made in consequence of that act which are not allowed for and included in the items of paragraph 21 of the original bill?

A. No, sir.

Q. 25. Were there any changes made in the masonry in the piers in the river, or those of the approaches of either side, not allowed for and included in the items of paragraph 21 of your bill?

A. The only item not included in paragraph 21, was the additional expense of relaying stone upon piers Nos. 7 and 8, as shown upon Exhibit No. 2, attached to the complainant's bill; the iron spans resting upon these piers had been erected previous to the passage of the act of March, 1871, and had to be raised to the hight required by that act, and the masonry rebuilt under the spans, the work being attended with great difficulty. Being unable to ascertain the exact amount of additional cost of rebuilding these piers, I have estimated it at $2,525, and have allowed that amount in statement of final estimate of G. A. Smith & Co., but have not included it in paragraph 21 of the bill.

Q. 26. Did you take receipts of money paid to Smith & Co.? And, if so, please identify and furnish copies of these receipts as part of the answer to this question.

A. I did take receipts for all amounts paid to Smith & Co. by me, and furnish herewith as part of the answer to the interrogatory a copy of the last voucher so paid by me, which includes a full statement of account of work done by them under their contract, and of amounts previously paid to them on account of the same; the total amount of work done to that time being $507,859, and the total amount previously paid on account of the same being $470,000, there being at that time retained on account of the ten per cent. reservation mentioned in the contract the sum of $32,659, making the amount due for work done previous to February 1st, 1872, the date of his voucher, the sum of $5,200, which amount is receipted for in full as shown upon the voucher.

(The copy of the voucher above referred to is hereto attached, and marked Exhibit H. C. S., C.)

Q. 27. Please examine the paper I show you and state what it is, and whether the statements contained in it are true.

A. The paper shown me is paragraph No. 18 of the answer of the Newport and Cincinnati Bridge Company, and J. Edgar Thomson, defendant in case No. 39415 of the court of common pleas, Hamilton
182 County, State of Ohio. I have here the paper, and to the best of my knowledge and belief the statements therein contained are true.

Counsel present the printed paper marked Exhibit H. C. S., D, and agree that it is a true copy of the pleadings, petition, and answer in the case of George A. Smith & Co. against the Newport and Cincinnati Bridge Company and others referred to in the witness' statement above, and shall be filed with his deposition as evidence in the case subject to objections as to competency.

Q. 28. Will you examine paragraphs 19, 20, and 21 of said answer, and state whether the statements therein contained are true?

A. I have examined the paragraphs named, and believe them to be true.

Q. 29. Please examine paragraph 24 of said answer, and state whether or not the statements of said paragraph are true.

A. The paragraph referred to, as far as the words "whole balance, $50,782.47," is a statement of the final estimate of work done by G. A. Smith & Co. for the Newport and Cincinnati Bridge Company. It was prepared by me and is correct; the prices for extra work therein set forth having been fixed by me, being unable to procure from Smith & Co. any statement of the value of their extra work.

Q. 30. State whether or not the allowance made by you for extra work was reasonable and fair.

A. I believe the allowances made were reasonable and fair.

JOHN C. WILSON.

Sworn to and subscribed before me this day of July, 1875.

[SEAL.] HENRY C. SPACKMAN,
Notary Public.

Cross-examination of Mr. Linville resumed:

Q. 37. Was there any change made in the length of bridge and its approaches after the contract with Franciscus of the 8th of October was made?

A. The plan of approach on which our estimates were based and the

superstructure for which the contract with the Keystone Bridge Company was made was 3,372 feet in length between the termination of the approaches on a straight line. The bridge, as constructed from the east side of Eggleston avenue to the termination of the southern approaches and Taylor street, Newport, was 3,065.96 feet.

Q. 38. Did the Keystone Bridge Company receive any notice of the change of the bridge, as contemplated by its original contract in
183 October, 1868, except through you, and did you not get your knowledge from directions given you as engineer of the Newport Bridge Co. as to a second examination to complete plans?

A. I am not aware that the Keystone Bridge Co. had official notice from any other party except myself. I obtained my information generally by conversations with the various officers of the bridge company at our consultations with them in reference to change of plans. I believe it was assumed by them that any information given to me at such consultations was at the same time information for the Keystone Bridge Company. That was the usual method of Mr. Roberts conducting business with me; it was generally done verbally, that is, in reference to contracts in which I was interested as president of the Keystone Bridge Company and as engineer in charge of the work.

Q. 39. Have you examined to ascertain whether any written communications of any kind passed between the Keystone Bridge Company and the Newport Bridge Company as to the change of plan proposed in 1868? and, if so, please produce, as part of your answer, copies of such communications.

A. I have examined my letter-press, copy-books, and letter-files, and find no written communications from the Newport and Cincinnati Bridge Company or their officers to the Keystone Bridge Company directing or relating to a change from the high grade to a low-grade plan.

Q. 40. Please state when the plan of low bridge was finally approved by the Newport Bridge Company.

A. The engineering data, by which we understand the fixing of the grade, the elevations, arrangement of spans and roadways, were in the main fixed in December, 1868. Some matters of special difficulty were finally settled in January, 1869, after which I proceeded to prepare the working plans.

Q. 41. Will you state what amount of stone work you estimated to have been necessary under the high-bridge plan proposed and on the basis of which the contracts of October, 1868, were made?

A. By the estimate submitted for the high bridge, with two roadways and a single-track railway, in August, 1868, the quantity of masonry was as follows: Limestone masonry, 11,410 perches; sandstone and freestone masonry, 13,185 perches; total, 24,595 perches. I cannot say whether the contract was based on this estimate or not.

Q. 42. Was that the only estimate made previous to November, 1868?

A. That was the last estimate made previous to that time in my recollection, and the only one relating to that kind of sub or super structure.

184 Q. Have you with you the drawing made in August, 1868, for a high bridge, and, if so, will you please append a copy thereof to the answer to this question?

A. I have the original drawing on which the first estimate was based for a high bridge with three trusses, single-track railway and double-track roadway, and will have copy of same appended.

(The copy referred to is hereto attached, and marked Exhibit H. C. S., E.)

Q. 44. Will you please explain the pencil-sketch shown upon this drawing as a single-track railway and double-track roadway, and pier thereon, as drawn by Mr. Thomson?

A. I give a copy of this pencil sketch on the copy appended. At the first meeting between Mr. Thomson, Scott, Roberts, Gaither, Franciscus and myself, when my first estimates were submitted, Mr. Thomson suggested that the cost of the bridge for a railway and double-track roadway, as designed, would be too great, and desired me to make estimates for the bridge with a railway thirteen feet wide in the clear, with two roadways, each ten feet wide, and made these sketches and drew in pencil to explain his idea. The estimate of masonry I have given is for this plan. It was for this kind of a bridge that our contract was made in October, 1868. It is specified particularly in our contract.

Q. 45. Will you please to furnish and append to your answer to this question a statement of items composing the aggregate charges for the changes made which are set forth in the statement you have appended to your former answer given in chief?

A. At the time I made up that statement, myself and assistants in the office made a thorough examination of the drawings, with the changes that would be required in adapting the bridge and modifying the work to the high bridge, made out bills of materials, lumber, etc., required to make these changes, estimating the same pro rata with the other work embraced in the contract, at the contract prices, and from this data determined the cost of each item of work to be done as nearly as possible. That data was not preserved, as it was on loose sheets of paper and cannot be produced. This result was reported to Mr. Roberts, and I was authorized to proceed to make the change in construction. The estimate rendered by me of the work done in accordance with this data and the final estimate paid us corresponds with the amount stated in that exhibit. In addition to that amount, there were other balances paid to us, which were approved by John C. Wilson, which are not contained in that statement. I cannot state of my own knowledge the amount of these balances.

185 Q. 46. I observe in your statement that as to a number of spans you charge for extra stringers and struts. What gave rise to the necessity for this addition?

A. These were added in consequence of the increased grade, and to prevent shoving, additional strength being required to meet increased pressure required by change of grade.

Q. 47. In your charge as to spans 5 and 6 I find the items for suspending floor and raising span, amounting to over $14,000. How was this expense occasioned?

A. By reference to Exhibit 1, to the bill, it will be observed that the roadway and railway grades coincide at the end of span six, and both the railway and roadway are carried over span five and six at same grade, the roadways outside of these tresses being suspended on the same cross-girders that sustain the railway tracks. By reference to Exhibit No. 2 it will be observed that the grade of the roadway over spans 5 and 6 falls below the lower chord of the railway trusses, and that the grades do not coincide until the northern end of span number 5. In order, therefore, to support the roadway, it was necessary to suspend the long cross girders previously designated at the level required by the roadway grades, and strut them down from the railway trusses to prevent vibration, and also to brace them against lateral motion. It was further necessary to substitute new cross girders to support the railway tracks. Besides this, additional stringers and struts were re-

quired to strengthen the railway track. The expense of this is included in the item of extra work in suspending floor. The item of raising spans 5 and 6 to the high revised grade was an estimate of the cost of providing tresselling sufficient to support those spans when the masonry was removed, and for elevating them by hydraulic apparatus as the masonry was being rebuilt under them. It was a very dangerous and critical operation, and the estimate for this was submitted and considered, before it was adopted as the best plan. It was deemed best by the company to pay us this for the risk than to take the spans down and replace them.

Q. 48. What occasioned the expenses in item for raising bridge in the Front street span in Newport?

A. The Front street railway trusses of Exhibit 1 were through bridges, track on lower chord, with light roadway trusses opposite. In Exhibit 2 these bridges appear at very nearly the same elevation, but on a different gradient. The item referred to embraces not only the changes required in the railway trusses, but the radical changes required in the roadway truss. We were obliged to suspend the roadway truss a considerable distance below the railway, and provide additional stiffness to the roadway trusses and lateral and diagonal braces, &c.

186 Q. 49. In your estimate of the cost of superstructure according to the change required by Congress, you give the total amount at $609,854.22, less a correction of $442.04; this includes, as I understand it, the cost of the pivot-center; am I correct?

A. You are; the cost of the pivot-center included in this amount is $5,057.96, and we were paid this amount for it in our final estimate.

Q. 50. Is the cost of the pivot-center and cost charg'able to the United States as a result of the change required by the act of Congress?

A. Each company having to pay for it, it would be a legal question which I do not feel competent to decide. The bridge company paid for it, and we afterwards purchased it from them, and propose to use it elsewhere.

Re examined:

Q. 51. Are these charges reasonable, or otherwise?

A. I believe they are entirely reasonable. The contract for the iron was made immediately after the contract with Franciscus, and though the price of iron afterwards declined we did not obtain the advantage of the decline, being bound by the contract.

J. H. LINVILLE.

Sworn to and subscribed before me this 28th day of July, A. D. 1875.
[SEAL.] HENRY C. SPACKMAN,
Notary Public.

Adjourned to Tuesday, July 29th, 1875, at 10.30 a. m.

JULY 29TH, 1875—10.30 a. m.

Present, Wm. M. Ramsey, esq., for Newport and Covington Bridge Company; Warner M. Bateman, esq., for U. S.

GEORGE B. ROBERTS, a witness produced on behalf of the complainant, being duly sworn, says:

Q. 1. Please state your name, age, residence, and occupation.

A. George B. Roberts; I am 42 years old; residence, Philadelphia; occupation, civil engineer.

Q. 2. What connection, if any, had you with the Newport and Cin-

cinnati Bridge Company, and with the construction of the bridge built by that company over the Ohio River at Cincinnati?

A. I represented the interest of the Pennsylvania Railroad Com-
187 pany as a shareholder and bondholder in the bridge company. My duties were to look over the contracts and approve the expenditure of money and have a general supervision of the expenditures of the money. I did not keep the accounts of the Newport and Cincinnati Bridge Company, but approved the requisitions of the engineer of the bridge upon the Pennsylvania Railroad Company, which requisitions were charged to the bridge company when paid.

Q. 3. Can you state what contracts were made for the construction of the bridge, whether they were in writing or otherwise, and furnish copies of such as were in writing?

A. I think there were two general subcontracts for the construction of the bridge—one with Smith & Co. and the other with the Keystone Bridge Co. The copies of them, I believe, are with my clerk.

The first contract was between George C. Franciscus and the bridge company for the construction of the entire bridge. I think a copy of this contract is in the possession of Mr. Albert Hewson. Then Franciscus made a contract with Smith & Co. for masonry, and with the Keystone Bridge Company for the superstructure.

Q. 4. Did Franciscus carry out his contract or transfer it to another? If so, to whom?

A. Mr. Franciscus did not carry out his contract; he died before it was completed; it was assigned to Mr. Spackman by the administrators; Mr. Spackman continued the work for a short time, when the bridge company assumed his contracts with the subcontractors.

Paragraph 14 of the answer in the case of George A. Smith & Co. against the Newport and Cincinnati Bridge Co., in the court of common pleas, states correctly the history of the Franciscus contract and its termination, and paragraph 17 of the same answer contains a correct history of the Spackman contract and its termination, and I answer the question by adopting this statement of the answer in that behalf.

Q. 5. Can you state the amount of money actually paid for the construction of the bridge upon all the contracts for construction?

A. I could not without reference to the books, which are kept by Albert Hewson; they show very correctly all money expended for the account of the construction of the bridge; these books are now here, and a statement can be made from them.

Q. Can you state why the face of the piers was not made parallel to the course of the river?

A. We did not think that the angle of the masonry as construc-
188 ted at right angles with the line of the road was sufficiently great to require the construction of the askew bridge; an askew bridge is when the masonry does not set at right angles with the line of the road.

Q. 7. What objection existed to the building an askew bridge at this point?

A. It would increase very materially the cost of the bridge, without being of any material benefit that we could see; no material benefit to the navigation of the river, as from the best information we could get we thought a vessel passing the bridge did not run exactly parallel with the current of the river, but more nearly parallel with the line of the piers as constructed.

Q. 8. Have you seen the bridge since the piers were erected, and looked at it with reference to this subject?

A. I have seen the bridge since the piers were constructed and observed vessels passing under it.

Q. 9. Is it now your opinion that navigation at that point is or is not injuriously affected by the manner it is constructed?

A. I do not think that navigation is materially interfered with by the construction of the bridge at this point.

Q. 10. What induced the suspension of the work upon the draw-bridge in March, 1871, and t' substitution of the high bridge and through bridge therefor?

A. The act of Congress requiring a change of elevation of the bridge above water.

Q. 11. Will you cause to be made up from the books to which you have before referred, and append to your deposition, a statement showing the entire cost of the Newport and Cincinnati bridge up to its completion, and separately showing the amount actually expended up to March 3, 1871?

A. I will endeavor to do so.

(The statement above referred to is hereto attached, and marked Exhibit H. C. S., G.)

Cross-examination:

Q. 12. How long have you been engaged in the occupation of engineer?

A. Ever since I left school; since I was eighteen.

Q. 13. State whether or not, if you know, if Franciscus made the contract for the building of this bridge in his own right and interest, or in trust for the benefit of somebody else, and, if so, who.

A. The contract was made in his own name before I knew anything about it, and I cannot say for whom it was made.

Q. 14. State if you know by whom the money was furnished for the building of this bridge, paid in the name of Franciscus and his successors in the contract.

189 A. That money was clearly furnished by Franciscus. He received the bonds and stock of the bridge company, and the Pennsylvania Railroad Company purchased them of him, and from the proceeds of such sales the money was paid the contractors for the construction of the bridge.

Q. 15. Can you state whether or not all the moneys paid to Franciscus were by him expended in the construction of the bridge?

A. I believe every dollar was.

Q. 16. So that no profits under said contract were retained or held by Franciscus; is this so?

A. On the death of Franciscus it was arranged that five thousand dollars of stock should be given to his estate, and the contract assigned to Spackman; I think that is the sum.

Q. 17. What interest did Spackman represent?

A. The same interest that Franciscus did.

Q. 18. Did he receive the assignment of this contract in trust for the general interest of the Pennsylvania Railroad Co. or others?

A. He received the assignment of the contract in trust for the general interest of the Pennsylvania railroad.

Q. 19. Then, after the assignment to Spackman, the railroad company became the real contractors for the construction of this bridge?

A. Yes, sir.

The contracts of bridge company with Franciscus was presented by the witness; the contract with G. A. Smith & Co., transfer of Francis-

cus to Henry C. Spackman, and abrogation of contract by Spackman, copies of which are hereto annexed, marked Exhibits H. C. S., H, I, K, L, respectively, which it is agreed by counsel are genuine.

Q. 20. What relation had you to the parties connected with these contracts, and what did you do with reference to their execution?

A. The Pennsylvania Railroad Company furnished all the funds for the construction of the bridge, and insisted that some of its officers or agents should have supervision of the disbursements under the contracts for construction; thereupon I was appointed, with the consent of the bridge company, by Franciscus, as his agent, to make payments under the contracts, and after the transfer of the contracts to Spackman and with like consent, in the same capacity under him; and when the contract was cancelled, and the subcontracts assumed by the bridge company, I was appointed assistant treasurer of the bridge company, and continued as before to supervise the disbursements for construction.

Q. 21. Had you any other connection with the affairs of the bridge company than as above stated for the payment of moneys for its construction?

190 A. No, sir; I supervised contracts and approved of the same.

Q. 22. In whose behalf did you supervise contracts and plans, and in what capacity?

A. In behalf of the Pennsylvania Railroad Company as holder of the securities, and as being interested in the construction of the bridge to form a rail connection between the Little Miami Road and the roads terminating opposite Cincinnati, the Pennsylvania Railroad Company being guarantors of the lease of the Little Miami Railroad and the Pittsburg, Cincinnati and St. Louis Company. During the construction of this bridge I was acting as assistant to the president and of vice-president consecutively of the Pennsylvania Railroad Company.

Q. 23. Had you any connection with legislation in Congress with reference to this bridge, and, if so, what?

A. No, sir; I had nothing to do with obtaining any legislation in reference to the construction of this bridge.

Q. 24. At what angle with the current, with the main current, were these piers constructed?

A. I think about ten degrees.

Q. 25. At what distance apart at low-water mark were the piers at the main channel constructed?

A. I do not recollect that detail now.

Q. 26. What reduction would that angle of ten degrees make in the width of the current passing through the main channel span?

A. Think about $8\frac{3}{4}$ feet.

Q. 27. I understand you to say that the bridge was constructed so that the piers should be at right angles with the line of the road passing over them; was not that in view only of economy in the construction of the bridge?

A. Yes, sir.

Q. 28. Can a bridge sufficiently strong be constructed over piers other than at right angles with the line of the road?

A. Yes, sir.

Q. 29. Is there any other consideration that could effect the question of so constructing the piers except that of economy?

A. There is no other reason except that of economy, and making a more satisfactory bridge to keep in repair and maintain, as a right-angled bridge is always considered a better and safer construction than an askew bridge.

G. B. ROBERTS.

Sworn to and subscribed befor' me this 29th day of July, A. D. 1875.
[SEAL.] HENRY G. SPACKMAN,
Notary Public.

191 I hereby certify that the above-named witnesses were duly qualified and examined at places stated in the above caption, and subscribed their respective depositions in my presence.
[SEAL.] HENRY C. SPACKMAN,
Notary Public

EXHIBIT H. C. S., A.

This agreement made and concluded the sixteenth day of October, anno Domini one thousand eight hundred and sixty-eight, by and between the Keystone Bridge Company, of Pittsburg, State of Pennsylvania, of the first part, and George C. Franciscus, of Philadelphia, State of Pennsylvania, of the second part, witnesseth:

That for and in consideration of the payments and covenants hereinafter mentioned to be made and performed by the party of the second part, the party of the first part hereby agrees to provide all materials for false works and superstructure, and to erect, complete ready for use (iron rails, lamps, and toll-houses excepted), a first-class patent wrought-iron railway bridge, with roadways on each side, over the Ohio River, connecting Saratoga street, Newport, Kentucky, with Butler street, Cincinnati, Ohio, to paint the superstructure, and, after the erection of the superstructure, to remove the false works.

All the work to be executed in a good and workmanlike manner, and according to the plans and specifications following, and to the acceptance and approval of J. H. Linville as chief engineer.

SPECIFICATIONS.

The railway bridge over the river shall be a patent wrought-iron structure, consisting of spans measured from centre to centre of piers as follows: Commencing on Newport side—one span 160 feet, one span 180 feet, one span 200 feet, one span 240 feet, one span 420 feet, one span 240 feet, two spans 180 feet, or eighteen hundred lineal feet of the river bridge, in spans as above stated, or with such modifications in length and arrangement as will not increase the cost of the same. The bridge to be "through" bridge thirteen feet in clear between the trusses, with two roadways, each ten feet in clear, suspended one on each side of the railway bridge.

The railway bridge must be proportioned to sustain with safety
192 in addition to the weight of superstructure a moving load of three thousand pounds per lineal foot, uniformly distributed, the roadways to sustain each, in addition to weight and flooring and side railing, seventy-five pounds per superficial foot of surface. The roadways to be supported on cantilevers projecting from the trusses of the railway bridge.

The railway bridge approaches on the Newport side shall consist as per plan of two spans of deck bridge of approved wrought-iron construction, 67 feet between centres of piers, one through span 93 feet in length over Eglantine street, and three deck spans 90 feet in length.

The railway bridge approach on the Cincinnati side to consist of three deck spans of wrought-iron truss 85 feet in length, three deck spans 48 feet each, and one through span over Pearl street 75 feet in length, or with such modifications in length of spans as will not increase the cost of superstructure, or quantity of masonry.

The railway bridge to be proportioned to sustain safely, in addition to weight of superstructure, a moving load of 3,000 pounds per lineal foot, uniformly distributed. Adjacent to the spans of the approaches shall be erected, one on each side, the roadways, 10 feet wide in clear, supported partly on iron trusses and partly suspended from the railway truss, according to plans to be prepared by the chief engineer.

These trusses shall be in shorter spans supported on iron columns at intervals of about 45 feet, the spans being made continuous, connected throughout and stayed by the railway trusses, which shall be of increased strength where they support a portion of the roadways. Should it be as economical to employ iron or brick arches to sustain the roadways, they may be substituted, if by such methods the design and arrangement can be improved.

The cross-girders of the iron bridge shall be of wrought iron, extended in length to support the roadways; the beams of the deck and through spans of the approaches shall be wood, placed at intervals not exceeding two feet nine inches (2' 9"); the roadways shall be planked with two courses of oak planking in aggregate thickness of four inches—the under course being laid diagonally, with close joints, and well coated with pitch before laying the upper course; all the planking to be well nailed and secured to the joints; strong side railing shall be provided for the roadways throughout, guards for the trackways, and wooden screens between the railing and roadways over the river, and where necessary on the approaches.

The wrought and cast iron shall be of the best quality, as regards material and workmanship, and shall receive one coat of paint in
193 linseed oil at the works, and shall be painted with two coats of lead of appropriate tints, in linseed oil, after erection.

The construction of the work to be commenced as soon as the plans have been furnished by the chief engineer, and to be continued without interruption to completion.

The erection of the work to proceed continuously from the approaches towards the channel, and to be completed in three months after the last piers have been completed, at least twenty days having been allowed for the erection of each river span successively, exclusive of the channel span, and ninety days for the erection of the channel span.

Nothing in these specifications or this contract, however, to be construed so as to compel the erection of the river spans at seasons of the year or at stages of water deemed hazardous.

In consideration of the work herein mentioned to be performed by the party of the first part, the party of the second part hereby covenants and agrees to provide free of charge the necessary wharfage and grounds on which to unload and pile iron work and lumber for the false works and superstructure, as required during the construction and erection of the bridge, to prosecute the masonry of the successive piers of the approaches and in the river, in such manner and at such times as not to delay or interfere with the erection of the superstructure in successive spans, allowing the necessary intervals for the erection of each span, and to pay to the party of the first part for the work embraced in this contract and completed according to the same, to the satisfaction and acceptance of the chief engineer, the sum of five hundred and seventy-five thousand ($575,000) dollars, as follows, viz: On or about the first day of each month during the progress of the work a pro-rata estimate shall be made of the value and character of materials in progress and work performed in the shops of the party of the first part, and also of the materials delivered and the progress of erection, and ninety per

cent. of the amount appearing due and approved by the chief engineer shall be paid to the party of the first part on or before the twentieth day of the month in which said estimate has been made.

When all the work has been completed according to this contract and specification and approved by the engineer, with the further approval of the president of the Pennsylvania Railroad Company, or such engineer as he may designate, the balance then appearing due, including the percentage retained, shall be paid to the party of the first part.

194 In witness whereof the president of the Keystone Bridge Company hath signed the same and caused the corporate seal of said company to be hereon impressed, and the party of the second part hath hereunto set his hand and seal the day and year first above written.

(Signed) J. H. LINVILLE, [K. B. CO.'S SEAL.]
President Keystone Bridge Co.

Witness:
J. R. JONES.
(Signed) G. C. FRANCISCUS. [SEAL.]
Witness:
W. S. COTTINGER.

[5-cent stamp; 25-cent stamp; 5-cent stamp.]

195 EXHIBIT H. C. S., B.

Estimate of Newport and Cincinnati Bridge superstructure.

Work done to March 14, 1871, and amount required to complete bridge to revised gradient, 100 f. above low water.

Description of work.	Contract price orig'l plans.	Work done to March 14th, 1871.	Work to be finished as per contract and new work.
Spans A and B, Cincinnati	$11,556 67	$11,076 67	$480 00
Taking down, re-erecting with extra laterals, diagonals, and changes			2,865 36
Spans C and D	37,440 00	32,480 50	4,959 50
Spans C and D, changes required			2,400 00
Spans No. 1, river	23,620 84	20,025 24	3,595 60
Extra stringers and struts			575 74
Channel span No. 2	206,546 67	118,777 24	87,769 43
Extra stringers, struts, and cantilevers			1,470 00
Span No. 3, 237 feet	57,701 50	50,655 50	7,046 00
Extra stringers and iron struts			711 00
Span No. 4 in place of pivot			65,526 17
Spans 5 and 6, 202.5 f't each	78,210 00	71,154 80	7,055 20
Extra work in suspending floor			8,691 95
Stringers, struts, etc			1,215 00
Raising spans 5 and 6			5,670 00
Span Front street, Newport	22,841 34	17,369 53	5,471 81
Raising bridge to revised grade			3,852 00
Pivot span center furnished		5,500 00	
Span Market Space, Newport	3,292 50	2,757 15	535 35
	441,209 52	329,796 63	
Pivot span, contract price	58,178 00		
Spikes, bolts, pitch, etc	3,087 48		3,087 48
Total contract price, exclusive of guards, $7,200	502,475 00		
New span in place of A and B, 121 l'l f't. @ $90			10,890 00
Span roadway Front st., Cincinnati, plate bridge			16,490 00
3 spans on curve of approach, 318 l'l f't. @ $68			21,624 00
Spans Eggleston avenue, 102, @ $76			7,752 00
Extra false works and raising 25 f't higher, 1,054 l'l f't. @ $6			6,324 00
Engineering, drawings, etc			4,000 00
			$280,057 59

19	Work done to March 14, 1871	$329, 796 63
	Less overcharge for pivot center	442 04
		329, 354 59
	Work to be finished and new work	280, 057 59
		$609, 412 18
	Contract price original plans	502, 475 00
	Cost over original plans	$106, 937 18

EXHIBIT H. C. S., C.

No. 128.

The Newport and Cincinnati Bridge Co. to George A. Smith Dr.

1872.		Dols.	Cts.
Feb. 1.	For the following, as per bill No. 128, on record in engineer's office, Cincinnati:		
	Estimate No. 33 for work done under his contract, dated Oct. 9, 1868, viz:		
	15,538 perches freestone masonry, @ $18	$279, 684	00
	8,579 " limestone " @ $20	171, 580	00
	5,607 " brick masonry, @ $8.25	46, 257	75
	1,253 " spandril backing, @ $8.25	10, 337	25
		$507, 859	00
	Less 10 per cent. retained	50, 759	00
		$457, 100	00
	Add allowance on retained per cent., by order of G. B. Roberts, esq	18, 100	00
		475, 200	00
	Less am't paid as per voucher No. 113	470, 000	00
	Amount due	5, 200	00

I certify that the above account is correct; that the items therein specified were fully authorized and contracted for on favorable terms, and have been received for the use and benefit of the Newport and Cincinnati bridge.

(Signed) JNO. C. WILSON, *Engineer.*

197 Received, Feb., 1872, of G. B. Roberts, assistant treasurer, five thousand two hundred dollars, in full of the above account.

$5,200.00.

(Signed) GEO. A. SMITH.

☞ READ THIS.—The above receipt must be dated, and signed by the party in whose favor this voucher is made out; or, when signed by another party, the authority for so doing must in all cases accompany it; and this receipt must not be cut off from the body of the voucher.

EXHIBIT H. C. S., D.

Court of common pleas, Hamilton County, Ohio.

GEORGE A. SMITH & CO., PLAINTIFFS,
vs.
THE NEWPORT AND CINCINNATI BRIDGE Company and J. Edgar Thompson, defendant. } No. 39415.

Civil action for recovery of money and enforcement of lien. Amount claimed with interest from March 19th, 1872, $257,441.09.

Petition.—Filed May 29, 1872.

First. The plaintiffs state that they are a company of persons formed for the purpose of carrying on business and holding property within the State of Ohio, under the firm name and style set forth in the caption; that they are not incorporated, and that the defendant, The Newport and Cincinnati Bridge Company, is a body corporate by authority of law of the State of Ohio and of the State of Kentucky, and empowered to enter into contracts, and to construct the bridge hereinafter referred to; that on the ninth day of October, A. D. 1868, at the city of Cincinnati, the plaintiffs entered into a contract, in writing, with George C. Franciscus, of the city of Philadelphia, who had before then entered into a contract with said defendant for the construction of the work hereinafter referred to, whereby they agreed to furnish all the materials and construct the masonry of the bridge of said company at such point across the Ohio River as might be designated by the engineer of the bridge company, or his successors in office, according
198 to certain specifications referred to in said contract, and made part thereof. It was further agreed in said contract, that said work should be done within a reasonable time, and in a workmanlike manner, subject to the inspection and approval of said engineer, or his successors in office, and that all matters in difference, arising between said parties in relation to said work, should be referred to said chief engineer, or his successors, and that his decision and award should be final and conclusive. The said Franciscus, in consideration of the stipulations aforesaid, agreed, as a part of said contract, to furnish yard room for stone at the bridge site, and to pay the plaintiffs for said work and materials as follows: For the limestone masonry, twenty dollars per perch of twenty-five cubic feet, and for the sandstone masonry, eighteen dollars per perch of twenty-five cubic feet, and for the foundations, the cost of labor, material and superintendence; the said Franciscus further agreed to pay the plaintiffs in monthly estimates, to be made by said chief engineer, or his assistants, for work done, materials delivered at bridge site, and gotten out in quarry, at the relative value thereof, retaining ten per cent. until the final completion of the work, and upon the full and faithful completion thereof to pay in full at the rates hereinbefore specified; but it was mutually agreed and understood, that no percentage was to be retained on account of work and materials used in the foundations.

The specifications aforesaid provided that the piers in the channel of the river should be founded on the rock, if rock bottom could be reached at a reasonable depth, otherwise on a hewn timber grillage, or on piles below the level of low water. In foundations above low water, the piers were to be founded on a bed of concrete two feet in thickness: the depth

to which the foundations of the piers were to be sunk and the character and fitness of the foundations were to be determined by the engineer in charge of the works.

It was further provided that the masonry must be rock range work, the stones accurately squared, jointed, and bedded, and laid in courses of not less than twelve inches in thickness, regularly decreasing from bottom to top of pier. The stretchers were in no case to have less than once and a half their rise for their bed, and were to be not less than five feet in length, and it was provided that they should hold the size in the heart of the wall that they should show in the face, and that they should be so arranged as to occupy from one-sixth to one fifth of the entire face, and be similarly disposed in the back of thick walls, and that when the thickness of the wall would admit of their interlock-
199 ing, they should be disposed in that manner. In thicker walls stones not less than four feet in length were to be placed transversely in the heart of the wall, to connect the opposite sides or bind the backing. It was further provided in said specifications, that the stones used for backing should be well shaped, large stones of the same thickness as the face stones; that the beds should be cut parallel and true to the straight edge, and bedded solidly without spawls or underpinning, and scabbled off to secure a good bond with the headers. All interstices between the backing were to be filled with chips and loose stones before grouting. The face stones were to be pitched to line at the points, the faces being left rough as they came from the quarry, unless the projections above the draft should exceed three inches, in which case they were to be roughly scabbled off to that limit. Each course was to be laid in mortar composed of one part fresh hydraulic cement, of approved quality, to two parts sharp river sand, and after the backing of each course was leveled off and filled up it was to be thoroughly grouted with hydraulic mortar in the above proportions.

The stone of the two channel piers, and two piers contiguous to the same, were to be limestone, of quality to be approved by the engineer. The other piers, abutments, and retaining walls of approaches, it was provided might be built from above high-water of durable sandstone, or freestone, that would resist the action of frost and weather.

All the piers were to be coped with dressed stone, of thickness not less than eighteen inches on river piers and twelve inches on land piers. The cut-waters of river piers were to be dressed to a smooth and even surface, and fastened together with iron clamps or dowels at the usual level of ice floods, and four feet above and below that level; coping was also to be clamped with iron clamps.

Plaintiffs allege that the plan of said bridge, the masonry whereof said Franciscus had contracted to build for said defendant, and which was located at a point a short distance above Ludlow street in the city of Cincinnati, was for piers at the channel span one hundred feet high from low water mark in the Ohio River. That there were to be in all eight piers, and the piers other than those for the channel span were to be of such heighth as would be necessary to give the to superstructure the proper arch for strength. That they were to be of size sufficient to support a railway thirteen feet in the clear, and two roadways each ten feet in the clear, and there was also to be a way for foot passengers on the outside of each roadway. That pier number one, being the first pier on the Ohio shore, was to be forty feet in length, and ten feet in thickness
200 under the coping stone, with batter one-half inch to the foot. That pier number two was to be forty feet in length and twelve feet in thickness under the coping stone, with batter one-half inch to the foot.

That piers number three and four were to be each forty feet in length and thirteen feet in thickness under the coping stone, with batter one-half inch to the foot. That piers number five and six were to be each forty feet in length by twelve feet in thickness under the coping stone, with batter one-half inch to the foot. That pier number seven was to be forty feet in length by ten feet in thickness under the coping stone, with the same batter as piers five and six. That pier number eight was to be forty feet in length by nine feet in thickness under the coping stone, with batter one-half inch to the foot. That piers number two, three, four, five, six, and seven were to have also ice-breakers, with much greater batters. That said plan was exhibited to the plaintiffs prior to and at the time of making of their said contract, and it was agreed and understood by and between the plaintiffs and said Franciscus that said work was to be done in accordance therewith. That the estimated quantity of limestone that would be required for said work was seven thousand five hundred and nineteen and seventy three one-hundredths perches, and of sandstone twenty-nine thousand five hundred and seventy-two and seventy-one hundredths perches. That the prices stipulated in said contract were not such as to afford to the plaintiffs any profit upon the limestone masonry or face work, for the reason that the cost of the same would have been equal to or would have exceeded the contract price therefor. That the profitable portion of the work contracted for was the sandstone masonry, the relatively large quantity of which enabled the plaintiffs to stipulate to furnish the limestone masonry at the price aforesaid of twenty dollars per perch.

Plaintiffs state that they commenced work under said contract about the tenth day of October, A. D. 1868, and that shortly afterward, to wit, about the first day of March, A. D. 1869, the entire plan was by said defendant changed, so as to provide for channel piers seventy-two feet high above low-water mark in the Ohio River, and a round pier for a draw. That the piers, other than the channel piers, were reduced correspondingly in height, and all the piers were reduced in length and in thickness. That the plan of pier number one, being the first pier upon the Ohio shore, was so changed as to be built at the foundation fifty-one feet six inches in length, being the same length as in the original plan, and twelve feet thick, whereas the original plan was for twenty-one feet thickness; that it was by said change of plan to
201 be built up thirty-two feet, to the string course, where it was to be forty-three feet ten inches in length and six feet six inches thick; there it was to be set in to twenty-five feet nine inches in length by five feet nine inches thick, and built up to coping stone fifty-four feet above the top of the foundation.

That pier number two was to be commenced at the foundation at the same length as in the original plan, being sixty-six feet by fifteen feet ten inches in thickness; that it was to be built up eight feet seven inches, where it was to be sixty-four feet in length by thirteen feet ten inches thick, where it was to be set in to fifty-two feet in length by thirteen feet ten inches in thickness, then built up forty-two feet, to the string course, with regular batter, so that at the string course it should be thirty-four feet six inches in length by nine feet eight inches in thickness, then set in to twenty-seven feet four inches in length by nine feet eight inches in thickness, and up twenty-two feet six inches, with dimensions twenty feet six inches in length by eight feet in thickness under the coping stone. That piers three and four were to be at the top of the foundation fifty-six feet nine inches in length by fifteen

feet six inches in thickness, to be carried up fifty-two feet four inches to string course, with regular batter, and at the string course they were to be thirty-six feet in length by eleven feet nine inches in thickness; that they were there to be drawn in to twenty-seven feet and three inches in length by eleven feet nine inches in thickness, and built up twenty-three feet to the top of the coping, and that they were to be twenty-five feet six inches in length by ten feet in thickness under the coping. That piers numbered five and six were to be at the top of the foundation fifty-three feet in length by fourteen in thickness, and built up forty-four feet three inches to the top of the string course, where they were to be thirty-eight feet in length by ten feet three inches in thickness; that they were to be there set in to twenty-five feet seven inches in length by ten feet three inches in thickness, and built up twenty-three feet to top of the coping, and twenty-three feet six inches in length by eight feet in thickness under the coping stone. That pier number seven was to be forty-seven feet and seven inches in length by twelve feet and ten inches in thickness, thence to be built up thirty-eight feet to the top of the string course, where it was to be thirty-five feet long and nine feet six inches thick; there it was to be set in to twenty-three feet seven inches in length by nine feet six inches in thickness, and built up twenty-three feet in height to the top of the coping stone, and that it was to be under the coping twenty-three feet six inches in length by eight feet in thickness. That pier number eight was
202 to be twenty-five feet three inches in length by ten feet nine inches in thickness at the bottom, and built up fourteen feet to the string or level course, where it was to be set in to the length of twenty-three feet and to the thickness of nine feet eight inches, and built up twenty-three feet to the top of the coping, and to be twenty-one feet six inches in length and eight feet in thickness under the coping.

There was also to be a round pier for a draw or pivot pier, to be located between piers numbered five and six above, to be about forty-two feet in diameter at the top of the foundation, to be run up sixty-five feet in height and finished at thirty-seven feet in diameter. That guide was to be constructed on the up-river side of said pier and from the bottom to the top thereof, and the same was to be of limestone finely bush-hammered; and plaintiffs allege that by said change of plan the proportion of limestone masonry was largely increased, and that of sandstone masonry largely diminished. And plaintiffs then notified said Franciscus that they would demand extra compensation on account of said changes, and plaintiffs allege that he assented thereto, whereupon plaintiffs proceeded to construct and did construct masonry according to the plan last aforesaid, almost to the completion thereof, when, with the advice and consent of the defendant, said bridge company, the plan was again changed. Plaintiffs were required to and did proceed to reconstruct said piers, by tearing down pier number one to its foundation, and rebuilding it seventy-eight feet high and twenty-five feet in length by six feet in thickness below the coping stone, with a batter of three feet in the length and two feet eleven inches in the thickness thereof. That pier number two was taken down by plaintiff to the ice-breaker line, which is forty-two feet above the foundation, and built up to the height of ninety-five feet two inches above the timber grillage, and twenty-five feet six inches in length by seven feet ten inches in thickness below the coping stone, with a batter of a quarter of an inch to the foot. That piers numbered three and four were also taken down by plaintiffs to the string course, which is fifty-two feet

and four inches above the timber grillage, which is the foundation of said piers, and rebuilt to the height of one hundred and two feet four inches in length by ten feet in thickness under the coping stone, and with a batter of one foot and nine inches in the length and one foot nine inches in the thickness, reckoning from the string course to the top of the pier. That piers numbered five and six were taken down by the plaintiffs twenty-three feet to the string courses and rebuilt to the height of 40 feet and four inches above the string courses, and twenty-three feet six inches in length and eight feet in thickness under the coping, with a batter, reckoning from the string course, of two feet four inches in the length, and of two feet three inches in the thickness of the piers.

203 That pier number seven was by the plaintiffs taken down twenty-two feet six inches to the string course and rebuilt to the height of thirty-six feet and three inches above the string course, and twenty-three feet six inches in length and seven feet in thickness under the coping stone, with a batter of one inch in the length, and two feet six inches in the thickness of the pier, reckoning from the string course. That pier number eight was by the plaintiffs raised in height ten feet three inches, and made seventeen feet four inches in length, and six feet six inches in thickness, plumb work in iron corner-casings to the coping. That plaintiffs built upon the coping of said pier five feet two inches in height, seventeen feet four inches in length, and six feet six inches in thickness, plumb work with iron casings.

Plaintiffs further state that piers numbered six, seven, and eight had been by them completed under the second plan aforesaid, and the iron superstructure placed thereon; that when they were rebuilt as aforesaid, according to the third and last plan aforesaid, it became necessary to raise said superstructure, and the same was raised by hydraulic jacks, and the work of rebuilding said piers was done under said superstructure, whereby the expense and danger of said work was greatly enhanced, and the work itself greatly protracted. Plaintiffs further state that in the construction of the river piers under the second plan aforesaid, they were by the engineer in charge required to do and did a large amount of night work, and of Sunday work, for which they were compelled to pay, and did pay extra wages. That they were by said engineer required to use and did use extra exertions, and employ workmen at night work at extra cost, to get stone out from the quarries and transport it to the site of the bridge; that said extra work and Sunday work were necessary in order to secure the foundations and piers against water and ice; that said extra work, night work, and Sunday work were continued about four months, and from thirty to fifty men were thus employed.

That the men employed in Sunday work, as aforesaid, were also employed through the week, and by reason of being deprived of their rest upon Sunday were demoralized and unfitted for full work, and did not and could not do full work on week days. That by reason of the change of batter, resulting from the change from the second to the third plan aforesaid, the plaintiffs were compelled to recut, and did recut, a large portion of the limestone used in said piers, at considerable expense. That the ice breakers were also changed, and that the plaintiff's were compelled to recut and did recut, and change the batter of the limestone used therein. That the doweling was largely increased, and the coping changed and elaborated, all of which great-

204 ly increased the expense of said work. Plaintiffs further allege that at the time of the first change of plan aforesaid, the plan of the

abutments and approaches mentioned in the specifications, and provided for in said original plan, was also changed as follows: that a large amount of brickwork was substituted for stone; that the line of approach on the Ohio side of the river was shortened about eight hundred feet; that the number of piers and the amount of masonry were largely reduced, and the height of the approaches reduced to correspond with the reduction of height of the piers; that brick archways were substituted for retaining walls and piers; that thereby a large amount of sandstone masonry and shorework was dispensed with, and that the masonry constructed under the plan so changed was greatly elaborated, and made more expensive. Nevertheless, the plaintiffs proceeded to construct, and did construct, said work according to said change of plan; that subsequently, to wit, at the time of the second change of plan aforesaid, the plan of said approaches and abutments was again changed; that all the brickwork aforesaid was taken down and larger archways of brick and larger and higher piers of sandstone masonry were substituted, to correspond with the increased height of the bridge, according to the plan last aforesaid, and the plaintiffs proceeded to construct and did construct the same as so changed. That with each change of plan as aforesaid changes in the approaches upon the Kentucky side of the river were made to correspond therewith. And plaintiffs allege that all the changes aforesaid were made by the said bridge company, defendant, with the consent of the said Franciscus, while his said contract continued, and that Henry C. Spackman, during the time that he was substituted for said Franciscus in said contract, as hereinafter set forth, and that plaintiffs notified said defendant that they would demand extra compensation on account of said changes, and said defendant assented thereto.

Plaintiffs further state that the amount of limestone masonry furnished and laid by them in the construction of the work aforesaid, under the first change of plan aforesaid, was six thousand five hundred and twenty $\frac{40}{100}$ perches, and the value thereof was thirty dollars per perch; being in the aggregate $195,612.00; that the amount of sandstone masonry furnished and laid by plaintiffs was ten thousand three hundred and sixty-eight $\frac{55}{100}$ perches, and the value thereof was twenty-eight dollars per perch, being in the aggregate $290,316.60; that the amount of limestone masonry furnished and laid by them under the second change of plan aforesaid was two thousand three hundred and five $\frac{15}{100}$ perches, and the same was of the value of thirty-five dollars per perch, being in the aggregate $70,681$\frac{30}{100}$; that the amount of stone masonry furnished and laid by them under said second change of plan was four thousand eight hundred and ninety-seven $\frac{94}{100}$ perches, and the value thereof was twenty dollars per perch, being in the aggregate $97,958$\frac{80}{100}$.

That the amount of brick masonry furnished and laid by the plaintiffs under the first change of plans aforesaid was $2,296$\frac{35}{100}$ perches and the value thereof $8.25 per perch, being in the aggregate $18,722$\frac{4}{100}$, which sum the defendant agreed to pay the plaintiffs thereon. That the amount of brick masonry furnished and laid by them under the second change of plan aforesaid was $3,395$\frac{65}{100}$ perches, and the value thereof was 13\frac{25}{100}$ per perch, being in the aggregate $44,992$\frac{3}{100}$.

Plaintiffs further say that they superintended the construction of the foundations of said bridge, employed the workmen, advanced money, which has since been repaid to them, for labor and material to the amount of $143,582$\frac{60}{100}$, and that the entire work of said foundations was

done under their charge and supervision, and they allege that the value of their services was $14,358\frac{26}{100}$.

Plaintiffs further say that a short time prior to February 15, 1871, but at what precise date they are unable to state, the said George C. Franciscus departed this life, and that on the 15th day of February, 1871, an agreement in writing was entered into by and between the administrators of his estate and Henry C. Spackman aforesaid and the defendant, said corporation, whereby the said Henry C. Spackman was substituted for said Franciscus, in the contract hereinbefore referred to, and made by said Franciscus with said defendant, and that said contract of substitution was ratified by the unanimous vote of the stockholders of the defendant. On the 30th day of May, A. D. 1871, said defendant, by its board of directors, with the consent of two-thirds of its stockholders, passed a resolution releasing said Spackman from said contract, and assumed all the obligations connected therewith, or resulting therefrom, including the contract aforesaid with the plaintiffs. Plaintiffs further allege that they have fully completed the work which they were employed to do as aforesaid, including the work upon said foundations, piers, abutments and approaches, and that the same has been inspected and approved by said defendant's engineer, to wit, on the 19th day of March, A. D. 1872.

Plaintiffs further allege that the total value of said work, and of the superintendence of said foundations, is $732,640\frac{26}{100}$; that there has been paid to them on account thereof the sum of $475,200, and that there is due to them from the said corporation defendant on account thereof the sum of $257,441\frac{26}{100}$, with interest thereon from March 19, 1872.

206 Second. Plaintiffs allege that the work and labor aforesaid were done, and the materials aforesaid were furnished beginning October 10, 1868, and ending on the 19th day of March, 1872. That on the 29th day of May, 1872, they filed for record in the recorder's office of Hamilton County, State of Ohio, an attested account thereof, together with a copy of the contract made by them with said George C. Franciscus, and subsequently adopted by the defendant as hereinbefore set forth, and with a description of said bridge and the lots on which it stands, and which are connected therewith. That thereby they acquired a lien upon the same from said 10th day of October, 1868, for the amount due upon said account, which is $257,441.09, with the interest from March 19, 1872. That the items of said account are the several amounts stated in the first cause of action set forth in this petition.

That the premises in said lien are described as follows:

The bridge of the Newport and Cincinnati Bridge Company, including the avenues and approaches thereto, and the structures and improvements thereto belonging and appurtenant, together with the land on which said bridge and the avenues and approaches thereto are located, the same b ing described as follows: situate, lying and being in the city of Cincinnati, county of Hamilton, and State of Ohio, and beginning on the south side of Front street, twenty-five feet eastwardly of the east side of Butler street produced; thence south 44° east 40 feet; south 46° west 15 feet; south 40° east 40 feet; south 46° west 10 feet; south 25° 34′ east 126½ feet; south 44° east 250 feet, more or less, to low-water mark of the Ohio river; thence down said river 95 feet; thence north 44° west 450 feet, more or less, to the south side of Front street; thence east with the south side of Front street 160 feet, to the beginning. Also, that certain real estate bounded on the east by Eggleston avenue, on the west by Butler street, and on the north by Pearl street, and on the

south by Front street. Also, that certain real estate commencing on the west side of Butler street, 79 feet south of the southwest corner of Third and Butler streets; thence westwardly, parallel with Third street, 74 feet 6 inches, more or less, to M. B. Masson's lot (see Deed Book 71, page 654, Hamilton County Land Records); thence south with said Masson's east line 70 feet to Wade's Court; thence eastwardly with Wade's Court 74 feet six inches, more or less, to Butler street; thence northwardly 70 feet, more or less, to the beginning. Also, alley now vacated, known as Wade's Court, and commencing at a point on the west side of Butler street, 150 feet south of Third street; thence southwardly on the west line of Butler street 20 feet; thence west-
207 wardly the same width between lines parallel with Third street 178 feet, to Aupenheimer's east line. Also, that certain lot of land commencing at the northwest corner of Pearl and Butler streets; thence northwardly on the west side of Butler street 165 feet, to the south line of the tract last described; thence westwardly, at right angles, to Butler street 80 feet; thence southwardly 165 feet to the north side of Pearl street; thence eastwardly 80 feet on the north line of Pearl street to the beginning. Also, a lot commencing on the northwest corner of Butler and Friendship streets; thence northwardly on the west side of Butler street 60 feet; thence westwardly the same width between Friendship street and a line parallel therewith 70 feet. Also, a lot on the northwest corner of Front and Butler streets, being 50 feet front on Front street by 131½ feet on Butler street.

The plaintiffs further allege that the defendant, the Newport and Cincinnati Bridge Company, on the 10th day of September, A. D. 1868, executed a mortgage deed to the defendant, J. Edgar Thomson, and the same was, on the 28th day of October, A. D. 1868, recorded in Book 298, page 5, Hamilton County Land Records; that by said mortgage said company conveyed to said Thomson all and singular the bridge aforesaid, including the avenues and approaches thereto, and the railroad tracks, toll-houses, and other structures and improvements belonging thereto, and all the fixtures used or intended to be used in connection with said bridge, whether then erected or to be thereafter erected, together with the land on which said bridge is located, and all the privileges and appurtenances thereto belonging or in any wise appertaining, and all lands which should thereafter be acquired for the purposes of said bridge; also, all and singular the franchises, rights, privileges, immunities, income, rents, tolls, profits, benefits and advantages belonging or appertaining to or to arise or accrue from said bridge, with its appurtenances, and from the maintenance and operation thereof, including the income, tolls, benefits and advantages to accrue from the use of said bridge by the Little Miami, Columbus & Xenia, and the Louisville, Cincinnati & Lexington Railroad Companies.

Said mortgage was so made to said Thomson as trustee, to secure certain bonds to be issued by said company to the amount of $1,200,000. But plaintiffs allege that no bonds were in fact issued or negotiated until long after the commencement of said work by plaintiffs, and that their lien aforesaid is the first lien upon the property and premises aforesaid.

Wherefore plaintiffs pray for judgment against the defendant, the Newport and Cincinnati Bridge Company, upon the cause of
208 action first hereinbefore set forth for $257,441$\frac{92}{100}$, with interest thereon from March 19, 1872, and for the enforcement of their lien aforesaid, that the same may be declared to be prior to the mortgage aforesaid, and the premises therein described sold, and the pro-

ceeds of sale applied to the satisfaction of said claim, and for such other relief as may be just and proper.

SAGE & HINKLE,
HOADLY & JOHNSON,
Attorneys for Plaintiffs.

STATE OF OHIO,
Hamilton County, ss.

George A. Smith being first solemnly sworn, says that he is one of the plaintiffs, and that he believes the allegations of the foregoing petition to be true.

GEORGE A. SMITH.

Sworn to before me, and subscribed in my presence, this 29th day of May, A. D. 1872.

[SEAL.]

AARON W. GOLDSMITH.
Notary Public, Hamilton County, Ohio.

Answer of Newport and Cincinnati Bridge Company.—Filed January 14, 1873.

Court of Common Pleas, State of Ohio, Hamilton Co.

GEORGE A. SMITH & CO., PLAINTIFFS,
vs.
THE NEWPORT AND CINCINNATI BRIDGE COMPANY, and J. Edgar Thomson, defendants. } No. 39415.

The above named defendant, for answer to the petition, says:

1. That it is a corporate body, organized under the laws of Kentucky and Ohio, with an authorized and subscribed capital stock of one million two hundred thousand dollars, with power and authority to construct a bridge across the Ohio River, extending from Newport, in the State of Kentucky, to Cincinnati, in this State.

209 2. That on the 21st day of September, 1868, this defendant authorized on its part the execution of a contract in writing with George C. Franciscus, of Philadelphia, which was in fact executed on the 6th day of October, 1868, whereby it was agreed by the said Franciscus to construct, and complete and deliver to this defendant, within a reasonable time, a bridge ready for use over the Ohio River, between Cincinnati and Newport, described as follows: A first-class, patent, wrought iron railway bridge, thirteen feet in the clear, between trusses, with two roadways, each ten feet in clear width, suspended one on each side of the railway bridge. The railway bridge to be proportioned for a variable load of 3,000 pounds per lineal foot; the roadways to sustain each a variable load of 75 pounds per superficial foot of surface, with all needful guards and shields for carriages; footwalk, with heavy balluster or outside railing; also, the right of way and construction of suitable approaches to the bridge. The masonry to be rock range work, laid in cement, and placed on reliable foundations. The face stone of piers to high water mark to be limestone, other stone to be suitable sandstone or freestone. All materials and workmanship to be of the best quality, and in accordance with the plans and specifications thereto attached, and subject to the approval of J. H. Linville, as Chief Engineer. In consideration of which this defendant agreed to deliver to the said Franciscus one million two hundred thousand dollars of the

bonds of this defendant, bearing seven per cent. interest, clear of taxes. Ten thousand eight hundred shares of its capital stock, and the proceeds that might be derived from the remaining assessment upon the twelve hundred shares of its capital stock to be delivered as follows:

First. In order to meet the outlays for right of way, and preparing material, one hundred thousand dollars of the bonds should be advanced to said contractor.

Second. As the work progressed, bonds at par should be paid over monthly to the amount of estimates of Chief Engineer, and sixty per cent. of the stock; the remaining forty per cent. of stock to be held by this defendant until final completion and delivery of bridge by the contractor, when it should be paid over to him upon the certificate or final estimate of the Chief Engineer.

3. That afterward, on the 9th day of October, 1868, the said Franciscus entered into a contract in writing with the plaintiffs, whereby the latter agreed to furnish all the materials and construct the masonry of the Newport and Cincinnati bridge according to the specifications hereto attached, and to do the work within a reasonable time, and in a workmanlike manner, subject to the approval of the Engineer, at the prices therein named, to-wit: for limestone masonry, twenty
210 dollars per perch of twenty-five cubic feet; sandstone masonry, eighteen dollars per perch of twenty-five cubic feet; foundations at cost of labor, materials and superintendence, to be paid in monthly estimates to be made by the Engineer, for work done, material delivered at the bridge site, and got out in quarry at the relative value thereof, retaining ten per cent. until the final completion of the work, and upon the full and faithful completion thereof to pay in full at the said rates, but no percentage to be retained on account of work and materials used in foundations; and it was thereby also agreed that all matters of difference arising between the parties in relation to said work should be referred to the Engineer of the Bridge Company, and that his decision and award should be final and conclusive.

4. That specifications for said masonry were attached to both said contracts, and substantially the same, but differing in some particulars from those set out in the petition, and for greater certainty the said contracts and specifications are hereto attached, as a part of this answer, and marked Exhibit No. 1 and Exhibit No. 2.

5. That, although in the contract between this defendant and the said Franciscus, reference is made to a plan of the bridge as being attached thereto, yet, in fact, no plan was attached to the same, and no plan had at the date of either of said contracts been adopted or agreed to by this defendant.

6. This defendant admits that a plan for a projected bridge had been prior to that time drawn by its Chief Engineer, subject to the adoption or rejection of the Company, but it denies that the same is correctly described in the petition, and having no knowledge thereof, denies that said plan was exhibited to the plaintiffs prior to and at the time of the making of said contract between the plaintiffs and the said Franciscus, and denies that it was agreed and understood by and between them that said work was to be done in accordance therewith.

7. This defendant denies that the estimated quantity of limestone that would be required for said work was seven thousand five hundred and nineteen and seventy-three one-hundredths perches, and of sandstone twenty-nine thousand five hundred and seventy-two and seventy-one hundredths perches; it denies that the prices stipulated in said contract were not such as to afford to the plaintiffs any profits upon

the limestone masonry, or face work, for the reason that the cost of the same would have been equal to or would have exceeded the contract price therefor; and it denies that the profitable portion of the work contracted for was the sandstone masonry, the relatively large quantity of which enabled the plaintiffs to stipulate to furnish
211 the limestone masonry at the price aforesaid, of twenty dollars per perch; and on the contrary thereof, this defendant alleges that according to the said plan and the engineer's estimate thereon, the quantity of limestone masonry was eleven thousand four hundred and ten perches, and of sandstone masonry thirteen thousand one hundred and eighty-five perches; and, also, that of the said sandstone masonry eight thousand two hundred and thirty perches, according to said plan, would have been in eleven small piers in the approaches, which were generally to be five feet thick by fourteen feet long, all of which, if built according to the specifications, except a thickness of about two inches in the center, would have been "face work"; and that the remainder of said sandstone masonry, being four thousand nine hundred and fifty-four perches, was by said plan to be built in approaches and carriage ways at the ends of the bridge, which approaches were to consist of parallel walls, about three feet thick on top, and of sufficient thickness at the bottom to resist the pressure of the earth filling between them, so that fully one-third of the said sandstone masonry in said approach walls would be face work.

8. This defendant denies that the plaintiffs commenced work under said contract about the 10th day of October, 1868, and says that all work done by them in reference to the bridge of the defendant prior to the latter part of March, 1869, consisted in quarrying stone and cutting them to batter of one-half inch to the foot, so as to be suitable for any large masonary—no detailed plans having been furnished by the chief engineer prior to said last-mentioned date.

9. That this defendant, in November, 1868, had resolved not to adopt the proposed plan for its bridge hereinbefore referred to, and had directed its engineer in-chief to prepare drawings for one of a different character, which he proceeded to do, and on which he was engaged during said winter, and which were not completed and furnished to this defendant until the month of March, 1869; all of which the plaintiffs well knew.

10. That compared with the proposed plan above referred to, the plan actually adopted showed changes in the height and size of the piers, and in other respects, but the same are not correctly described in the petition; and of the relative quantities of the two different descriptions of masonry to be used, there was a reduction in the amount of sandstone masonry of eighteen and four-tenths per cent., whilst the reduction in limestone masonry was forty-one per cent., and there was required two thousand two hundred and sixty-nine perches of brick masonry not contemplated in the proposed plan above referred to, and that it is not true, as alleged in the petition, that by said change of plan the proportion of limestone masonry was largely increased, and that of sandstone masonry largely diminished.

212 11. That this defendant denies that the plaintiffs then notified said Franciscus that they would demand extra compensation on account of said changes, and that he, the said Franciscus, assented thereto; but this defendant admits that on the 3d day of April, 1869, the plaintiffs, by Geo. A. Smith, addressed a letter to J. C. Wilson, esq., the acting engineer of the Bridge Company, as follows:

CINCINNATI, *April* 3, 1869.

J. C. WILSON, Esq.,
Engineer Newport and Cincinnati Bridge Co.:

DEAR SIR: After examining the new plans for the masonry of the Newport & Cincinnati bridge, shown me this day, I wish to inform you that I cannot afford to do the work without an increase of compensation over that named in my contract. In the plans upon which I bid there was a much larger amount of masonry in both the river piers and the approaches, and no brick-work.

Brick-work has now, to a large extent, been substituted for stone, the stone-work greatly reduced in quantity, and the cutting increased and elaborated, thereby much increasing the cost. The great reduction in the amount, and change in the character of the work in the approaches, is particularly hard on me, as on this portion of the work I had expected to make my profits; the river work, even on the original plan, affording no margin at the price at which it was taken.

(Signed) GEO. A. SMITH.

12. This defendant says that said Wilson forwarded this letter to the agent of said Franciscus at Philadelphia, and thereupon the parties met personally in Cincinnati on the 15th day of April, 1869, when and where it was verbally agreed between the plaintiffs and the said Franciscus, that the plaintiffs should adopt the plans of the bridge as then proposed, as the plans intended by the contract, and to furnish the materials and do the work required therefor at the prices named in said contract, to be paid as therein provided, with the following additional understanding, to wit: that the said Franciscus should furnish, at his expense, two engines, as many boats as should be necessary to do the work upon the foundations; that the said Wilson, as engineer, should assist the plaintiffs in the matter of foundations; that plaintiffs should lay the bricks required, at the rate and price of $8 per perch; that the ogee course of capitals in the piers should be left out; that coffer dams should be used instead of caissons, when bottom of caisson would be exposed at low water; that the plaintiffs should
213 go on with the work on these terms, and push the same vigorously, and that, on completion of the work, the question whether, under the circumstances, the plaintiffs should have any increase over the contract price, and it so, how much, should be decided by J. Edgar Thomson, and the amount, if any, he should allow, should be paid him; but that the contract as to price should remain otherwise unaltered; and shortly thereafter, in pursuance of said verbal understanding and agreement, the plaintiffs by the said George A. Smith, on the 27th day of April, 1869, addressed a written proposal to George B. Roberts, the agent and representative of the said Franciscus, as follows:

APRIL 27TH, 1869.

GEO. B. ROBERTS, Esq., *Agent:*

SIR: I propose to build the brick work in the approaches of the Newport & Cincinnati bridge according to the plans and specifications, and under the instructions and to the satisfaction of the engineer in charge of the work, for the price of eight 25-100 dollars per perch of 25 cubic feet; the bricks to be furnished me, free of all expense, on barges, at points accessible to the work.

Yours, respectfully,
(Signed) GEO. A. SMITH.

Which proposal was accepted by the said Franciscus, and the plaintiffs notified thereof.

13. That the plaintiffs proceeded to execute and construct the said masonry according to said plan, and under said contract, until on or about the 1st day of February, 1871, when they had nearly completed the same, according to the following quantities and descriptions, to wit: Six thousand three hundred and ninety-seven $\frac{7}{100}$ perches of limestone, which, at twenty dollars per perch, amounted to one hundred and twenty-six thousand one hundred and forty $\frac{14}{100}$ dollars; ten thousand five hundred and fifty-four $\frac{54}{100}$ perches of sandstone, which, at eighteen dollars per perch, amounted to one hundred and eighty-nine thousand nine hundred and eighty-three $\frac{72}{100}$ dollars; and two thousand two hundred and sixty-nine $\frac{69}{100}$ perches of brick work, which, at eight $\frac{25}{100}$ dollars per perch, amounted to eighteen thousand seven hundred and twenty-two $\frac{25}{100}$ dollars—amounting in the aggregate to the sum of three hundred and thirty-four thousand eight hundred and forty-six $\frac{25}{100}$ dollars. And that at said last mentioned date there had been paid to the plaintiffs, on account thereof, under his said contract of the 9th day of October, 1868, and the supplement thereto made on April 15 and
214 27, 1869, various sums, on monthly estimates of the engineer in charge of said work, amounting in the aggregate to the sum of three hundred and twenty two thousand seven hundred dollars, which included fifteen thousand advanced to them on account of the ten per cent. reserve, which, by the contract, might have been withheld until the final completion of the work, and for which, on each payment, the plaintiffs gave receipts in full settlement thereof; each of the said vouchers specifying the amount and different kinds of work measured and paid for, and the prices at which the same were done, as named in said contract, to wit, twenty dollars per perch for limestone, eighteen dollars per perch for sandstone, and eight $\frac{25}{100}$ dollars per perch for brick masonry, and expressing that said payments were received in full settlement of the same.

14. That on or about the 25th day of July, 1870, the said George C. Franciscus died, and administration having been duly taken upon the estate, a contract in writing was entered into on the 15th day of February, 1871, between his administrators and this defendant, and Henry C. Spackman, of the city of Philadelphia, in which it was recited that the said Franciscus had partially performed his contract with this defendant for the construction of said bridge, and had received a proportionate part of the consideration therefor stipulated in said contract, and by which it was agreed that the said Spackman should be substituted in his place, and in consideration of the unpaid portion of said compensation therefor to be paid to him, should fully perform the unfilled obligations of the said contract on the part of said Franciscus then remaining, and the estate of the said Franciscus released from all liability on account thereof; of which substitution and release the plaintiffs had notice, and to which they assented, and whereby they became subcontractors for said masonry, under the said Spackman, instead of said Franciscus, according to the terms of their said contract with the latter. And this defendant says that it paid to the said Franciscus during his lifetime, and after his death to his said administrators, on account of and in full settlement of its contract with him, and for all work done by him and them under the same, according to the said contract, as follows, in addition to the capital stock called for by the same:

1868. December	15—Bonds Nos.	1 to 100.....	$100,000 00
1869. February	4—Bonds Nos.	101 to 200.....	100,000 00
1869. May	25—Bonds Nos.	201 to 300.....	100,000 00
1869. July	13—Bonds Nos.	301 to 400.....	100,000 00
1869. September	25—Bonds Nos.	401 to 500.....	100,000 00
1870. January	—Bonds Nos.	501 to 600.....	100,000 00
1870. May	25—Bonds Nos.	601 to 700.....	100,000 00
215 1870. August	16—Bonds Nos.	701 to 800.....	100,000 00
1870. September	29—Bonds Nos.	801 to 900.....	100,000 00
1870. November	5—Bonds Nos.	901 to 1000.....	100,000 00
1870. December	28—Bonds Nos.	1001 to 1100.....	100,000 00
1871. February	7—Bonds Nos.	1101 to 1150.....	50,000 00
Total			$1,150,000 00

And on March 8, 1871, to H. C. Spackman, in full settlement of the said contract with him, and of all work done under the same to date of said settlement, the further amount in said bonds, Nos. 1151 to 1200 $50,000.00, making the entire issue of one million two hundred thousand dollars thereof.

15. That the Congress of the United States, by the fifth section of the act entitled "An act making appropriations for the service of the Post-Office Department for the year ending June 30th, 1872, and for other purposes," approved on the 3d of March, 1871, enacted that it should be unlawful for this defendant, the Newport & Cincinnati Bridge Company, or any other company or person, to proceed in the erection of the bridge then being constructed over the Ohio river, from the city of Cincinnati, Ohio, to the city of Newport, Kentucky, and the approaches thereto, meaning the said bridge of this defendant, unless the said bridge should be so constructed that the channel span of four hundred feet, as then located, should have under said span a clear headway at low water of one hundred feet below any point of said channel span, and that in such case no draw should be required in said bridge, and that all the other spans of said bridge which cover the Ohio river at low-water mark should have a clear headway of not less than seventy feet above low-water mark, and that the other spans of said bridge extending to each shore might be made of less elevation than seventy feet above low-water mark to accommodate a regular grade for the approaches to said bridge; and that when the foregoing requirements should have been complied with by this defendant, the location of said bridge, its structures and approaches should thereupon be deemed to be legalized and declared to be lawful structures, and should be recognized and known as a post route, and that the plans for changes in said bridge made necessary by the said act should be submitted by the said company to the Secretary of War for his approval.

16. That immediately upon the passage of said act of Congress, the further prosecution of the work upon said bridge, according to the previous plans, was suspended, and this defendant caused plans for said bridge in accordance with said act of Congress to be prepared
216 and submitted to the Secretary of War for his approval, and said plans were completed and approved on or about the 23d day of August, 1871.

17. That on the 22d of June, 1871, this defendant entered into a contract in writing with the said Henry C. Spackman, whereby, after reciting the original contract for the construction of said bridge with the said Franciscus, dated on the 6th of October, 1868, and the agreement

to substitute the said Spackman in place of the said Franciscus to the same, and that the changes in said bridge required by said act of Congress would add largely to the amount originally contemplated as the cost thereof, it was agreed, that in consideration of the undertaking of the Pennsylvania Railroad Company to furnish the money required to meet the contracts and obligations of said Spackman, as they then existed at the date of said agreement, and to complete the bridge of this defendant, the amount of money so furnished to form an indebtedness of this defendant to the Pennsylvania Railroad Company, the said contract with Franciscus, to which the said Spackman had been substituted, was thereby abrogated, and said Spackman released from all liability to this defendant on account thereof, this defendant also thereby assuming the obligation of the said Spackman, and of the said Franciscus to the Pennsylvania Railroad Company for all moneys advanced to either of them in excess of the sum of one million two hundred thousand dollars; and also the contracts entered into by said Spackman and by said Franciscus for real estate, labor and materials used or to be used in locating and constructing said bridge, in so far as they then remained incomplete or unsatisfied at the date thereof; of which last mentioned agreement, between this defendant and the said Spackman, the plaintiffs were duly notified, and to which they assented. And this defendant says the contracts of the said Spackman and the said Franciscus thereby assumed by it, and thereby referred to, so far as relates to the plaintiffs, were the original contracts in writing entered into between the plaintiffs and the said Franciscus, dated on the 9th day of October, 1868; and the modification thereof made between them on the 15th day of April, 1869, as hereinbefore set forth, and did not and does not embrace any other claims against them, or either of them, that may exist on the part of the plaintiffs, and did not and does not include any claims of the plaintiffs against the said Franciscus, or the said Spackman, for breaches on the part of either of them of said contract, which had accrued prior to the date of said assumption, or for work, or labor, or services of any kind outside of said contract, and not rendered under it.

18. That immediately after the passage of said act of Congress,
217 this defendant, in view of prosecuting the work of making said changes therein required, and completing the construction of said bridge, proposed to the plaintiffs to settle with and pay them for the labor and materials supplied by them as aforesaid to that date, according to the previous plans of said bridge, and under their said contract, as aforesaid, with the said Franciscus, and that the plaintiffs should thereupon make new proposals, and enter into a new contract for making the changes required in the masonry of said bridge by said act of Congress, and completing the said masonry of the same according to the plans then to be adopted and approved by the Secretary of War, which the plaintiffs declined to do, electing to go on with said masonry as required by said new plan when approved, according to the terms and at the rates specified in said contract with said Franciscus, dated on the 9th day of October, 1868, and supplement thereto, of April 15, 1869, to which this defendant then and there assented, and the plaintiffs proceeded with the same accordingly. And this defendant denies that then, or at any other time, the plaintiffs gave notice to this defendant that they would demand extra compensation on account of the changes in the plan of said bridge, as required by said act of Congress, and denies that this defendant ever assented thereto, but insists, on the contrary, that it was the understanding on which the defendant and the plaintiffs mutually acted that, notwithstanding said changes,

the rates to be paid for said masonry should be governed by the contracts between the plaintiffs and said Franciscus, as above set forth.

19. That the change of plan required by said act of Congress involved the taking down the brick work in the approaches on both sides of the river, which was done on the Ohio shore by this defendant, and on the Kentucky shore by the plaintiffs, who were fully paid for the same; and that so much of the stone masonry already laid as had to be torn down and the stones recut was sold by the defendant, having already been once paid for, or agreed to be, at full contract prices, to the plaintiffs as it stood in the piers, they to take it down at their own expense, at the rate of six dollars per perch for limestone from rectangular piers, and three dollars per perch for sandstone from rectangular piers, and four dollars per perch of all kinds of stone from pivot pier, and which, recut if necessary, were used again by the plaintiffs in said work, and for which they were allowed the second time the full contract prices, thus more than compensating them for the expense of tearing down and recutting the said work; and that the plaintiffs did not raise the iron superstructure when that was necessary, that work having been done by the contractors for the bridge superstructure; and the dowel-
218 ing provided for in the contract was not exceeded in the work so done to a greater extent than three courses in each of the piers with ice-breakers, in all eighteen courses, which, at twenty dollars each, would amount to three hundred and sixty dollars.

20. That in all other respects the masonry required by the altered plan, as required by the act of Congress, corresponded with that according to which the bridge had already been built, so far as it had progressed, and was covered by the specifications of the said original contract with the plaintiffs, except as hereafter stated, and, in respect to quantities of the different descriptions, the whole work as performed by the plaintiffs was as follows:

Fifteen thousand eight hundred and fifty-eight perches of sandstone masonry; eight thousand six hundred and seventy-four perches of limestone masonry; five thousand six hundred and sixty-five perches of brick masonry, and thirteen hundred and fourteen perches of stone spandrils; the same being an increase in the sandstone masonry over the quantities estimated on the projected plan in October, 1858, of twenty per cent., and a decrease in the limestone masonry, compared with the same estimate, of twenty-four per cent.

21. That the amounts of said masonry work done by the plaintiffs after the said plans required by the act of Congress were adopted were as follows: Two thousand two hundred and seventy-six $\frac{75}{100}$ perches of limestone, amounting, at twenty dollars per perch, to forty-five thousand five hundred and thirty three $\frac{75}{100}$ dollars; five thousand three hundred and three $\frac{75}{100}$ perches of sandstone, amounting, at eighteen dollars per perch, to ninety-five thousand four hundred and sixty-one $\frac{50}{100}$ dollars; three thousand three hundred and ninety-five $\frac{75}{100}$ perches of brick masonry, amounting, at eight $\frac{75}{100}$ dollars per perch, to twenty-eight thousand and thirteen $\frac{75}{100}$ dollars, and thirteen hundred and fourteen perches of stone spandrils, at eight $\frac{75}{100}$ dollars per perch, amounting to ten thousand eight hundred and forty $\frac{75}{100}$ dollars—amounting to one hundred and seventy-nine thousand eight hundred and forty-nine $\frac{75}{100}$ dollars, and making the value of the entire work done by the plaintiffs, under their contracts, five hundred and fourteen thousand six hundred and ninety-five $\frac{75}{100}$ dollars, on account of which there had been paid to them on the 16th day of February, 1872, the aggregate sum of four hundred and seventy five thousand two hundred dollars.

22. This defendant denies that the plaintiffs are entitled to charge for their alleged services in superintending the work of laying the foundations of the piers of said bridge, and deny that the same
219 was done under their charge and supervision, and that they rendered services of value in connection therewith.

This defendant says that in the plaintiffs' original bid for their contract, they proposed to do the excavation and put in the foundations, providing men and material for the same, for a compensation of ten per cent. on the actual cost of the work, which is the rate and mode of computing the charge as made in the petition, as if said proposal had been accepted instead of being rejected, as it was; the contract with said Franciscus of October 9, 1868, expressly stipulating that the foundations were to be furnished at the cost of labor, materials, and superintendence.

This defendant says that the whole amount disbursed by or in the name of the plaintiffs, on account of the foundations, is one hundred and forty-six thousand and ten $\frac{87}{100}$ dollars, of which twenty-two thousand four hundred and eighty-six $\frac{51}{100}$ dollars was expended by the engineer in charge, to pay for the tools and materials purchased by him; that the immediate superintendence of carpenters, laborers and other workmen was attended to by foremen in charge of the various gangs of men, which foremen were paid at the end of each month, and their wages included in the expenditures above stated; that the general supervision of the work was performed by the engineer in charge, who gave his constant personal attention to it, who prepared all plans, and from whom the foremen and workmen directly received their instructions; that the managing contractor, the only one who appeared on the work, was so much engaged with the masonry of the bridge, and with his business—arising from his interest in building a bridge over the Missouri River, at St. Charles, at the same time—that he gave the foundations of the defendant's bridge little or no attention; that the purchases of material were to a large extent made by the engineer, and paid for by him, and those made in the name of the plaintiffs were, for the most part, made by a purchasing agent employed for that purpose, and who was regularly paid for his services, and the amount so paid included in the above stated expenditure as part of the costs of the foundations; that the services personally performed by the plaintiffs consisted chiefly, if not altogether, in the payment of monthly pay-rolls, prepared by a time-keeper, whose wages were included therein, and of bills brought to them by the purchasing agent, a service which did not occupy more than one day of each month, from May, 1869, to February, 1872, making in all thirty-four days, for which it would be a liberal compensation to allow at the rate of ten dollars per day, making three hundred and forty dollars, and an allowance of one month's interest on the
220 amount of one hundred and twenty-three thousand five hundred and twenty-four $\frac{13}{100}$ dollars, the average time and whole amount of their advances on that account making six hundred and twenty-seven $\frac{63}{100}$ dollars. But this defendant claims that by the terms of the said contract the plaintiffs are not entitled to any claim whatever beyond the cost to them of said foundations; but this defendant admits that there remains unpaid, and due to the plaintiffs, on account of expenditures made by them for said foundations the sum of nine hundred and eighty-eight $\frac{37}{100}$ dollars.

23. This defendant says that the total extra cost of night work done on said bridge by the plaintiffs did not amount to more than nine hundred and fifty-one $\frac{87}{100}$ dollars, and of Sunday work, if the plaintiffs are

entitled to claim therefor, to not more than two thousand two hundred and eighty-three $\frac{83}{100}$ dollars.

24. This defendant admits that the plaintiffs did certain extra work, for which they would be entitled to be allowed and paid, as follows:

First. Extra amount of coping on river piers, and roller guide of draw pier nine hundred and sixty square feet face, dressed, at two dollars per square foot, amounting to nineteen hundred and twenty dollars.

Second. Twelve pedestals for lamp-posts, at fifty dollars each, amounting to six hundred dollars.

Third. Two hundred and fourteen perches askew backs and caps on piers, at five dollars per perch, amounting to one thousand and seventy dollars.

Fourth. Five hundred and five perches of masonry, rebuilt under span numbers five and six, at five dollars per perch, amounting to two thousand five hundred and twenty-five dollars, so that the account between the plaintiffs and this defendant, making all the allowances herein enumerated, would be adjusted as follows:

Amount due for masonry at contract prices, five hundred and fourteen thousand six hundred and ninety-five 83-100 dollars	$514,695 83	
Balance unpaid on account of foundation, nine hundred and eighty-eight 37-100 dollars	988 37	
Five hundred and fifteen thousand six hundred and eighty-four 20-100 dollars		515,684 20
Payments on same, four hundred and seventy-five thousand and two hundred dollars		475,200 00
Forty thousand four hundred and eighty-four 20-100 dollars		40,484 20
Allowances for disbursing pay-rolls, night work, Sunday work, and extra work, ten thousand two hundred and ninety-eight and 27-100		10,298 27
Whole balance		$50,782 47

221 For which, with interest from the beginning of this suit, the plaintiffs have never previously demanded the same, and never having offered to submit the question of whether they were entitled to any increased compensation beyond their contract prices to J. Edgar Thomson, as by the contract of April 15, 1869, they were required to do, and if so, to what extent this defendant now admits to be due; and beyond that amount denies all indebtedness alleged against it in the petetion.

MATTHEWS, RAMSEY & MATTHEWS,
Attorneys for N. & C. B. Co.

STATE OF OHIO,
Hamilton County, ss:

Alfred Gaither, of lawful age, being duly sworn, deposeth and saith, that he is president of the defendant, the Newport & Cincinnati Bridge Company, in the above cause, and that the allegations in the foregoing answer of the said defendant contained are true as he verily believes.

ALFRED GAITHER.

Subscribed in my presence, and sworn to before me, this 11th day of January, A. D. 1873.

[SEAL.] J. E. STEVENSON,
Notary Public, Hamilton County, Ohio.

EXHIBIT No. 1.

This agreement, made this day of , A. D. 1868, between the Newport & Cincinnati Bridge Company, of the first part, and G. C. Franciscus, of Philadelphia, of the second part, witnesseth:

That for and in consideration of certain bonds, stocks, and money, to be hereinafter named, the said party of the second part agrees to construct, and complete, and deliver to the party of the first part, within a reasonable time, a bridge, ready for use, over the Ohio River, between Cincinnati and Newport, as described below, viz:

A first-class patent wrought-iron railway bridge, thirteen feet in the clear between trusses, with two roadways, each ten feet in clear width, suspended, one on each side of the railway bridge, to be proportioned for a variable load of 3,000 pounds per lineal foot, the roadways to sustain a variable load of 75 pounds per superficial foot of surface, with all needful guards and shields for carriages; footwalk, with heavy baluster, or outside railing; also, the right of way, and construction of suitable approaches to the bridge.

222 The masonry to be rock range work, laid in cement, and placed on reliable foundations. The face-stone of piers to high-water mark to be limestone; other stone to be suitable sand or freestone. All materials and workmanship to be of the best quality, and in accordance with the plans and specifications hereto attached, and subject to the approval of J. H. Linville, as chief engineer.

The said party of the first part, for and in consideration of the construction and completion of the bridge, as stated above, agree to deliver to the party of the second part $1,000,000 first mortgage bonds of the said Newport & Cincinnati Bridge Company, bearing seven per cent. interest (free of taxes); $200,000 of the second mortgage bonds of the said Newport & Cincinnati Bridge Company, bearing seven per cent. interest (clear of taxes); ten thousand eight hundred shares (full paid) of the capital stock of the said Newport & Cincinnati Bridge Company; and the proceeds that may be derived from the remaining assessment upon the twelve hundred shares of the capital stock of said company. The said bonds and shares of the capital stock of said company to be delivered to the party of the second part as follows:

First. In order to meet the outlays for right of way and preparing materials, one hundred thousand dollars of the bonds shall be advanced to the contractor.

Second. As the work progresses, bonds at par shall be paid over monthly to the amount of estimates of chief engineer, and 60 per cent. of the stock; the remaining 40 per cent. of stock shall be held by the company until final completion and delivery of the bridge by the contractor, when it shall be paid over to him, upon the certificate or final estimate of the chief engineer. It being further understood and agreed that the twelve thousand shares of stock, as set forth in this agreement, constitute the entire capital stock of this company, and the same shall not be increased without the consent in writing of G. C. Franciscus.

In testimony whereof said Newport & Cincinnati Bridge Company has caused its corporate seal to be hereto affixed, and the signature of Al-

fred Gaither, its president, to be hereto subscribed, and the said G. C. Franciscus has hereto set his hand and seal this day and year first above written.

Witnesses present. [L. S.]

223 *Specifications for masonry, Newport and Cincinnati bridge.*

The piers in the channel of the river will be founded on the rock, if rock-bottom can be reached at reasonable depth, otherwise on a hewn timber grillage, or on piles below level of low water. In foundations above low water the piers will be founded on a bed of concrete, two (2) feet in thickness.

The depth to which the foundation of the piers must be sunk, and the character and fitness of the foundation, will be determined by the engineer in charge of the work.

The masonry must be rock range work. The stones must be accurately squared, jointed, and bedded, and laid in courses of not less than twelve (12) inches thick, nor exceeding thirty (30) inches in thickness, regularly decreasing from bottom to top of pier. The stretchers shall in no case have less than once and one-half their rise for their bed.

Stretchers shall not be less than five (5) feet in length; headers shall be long stone, not less than five feet in length, and shall hold the size in the heart of the wall that they show upon the face, and must be so arranged as to occupy from one-sixth to one-fifth of the entire face, and to be similarly disposed in the back of thick walls; when the thickness of the wall will admit of their interlocking, they must be disposed in that manner. In thicker walls, stones not less than four (4) feet in length will be placed transversely in the heart of the wall, to connect the opposite sides, or bond the backing.

The stones used for backing must be well shaped, large stones, of the same thickness as the face stones; the beds must be cut parallel and true to the straight-edge, and bedded solidly, without spawls or underpinning, and scabbled off, to secure a good bond with the headers.

All interstices between the backing to be filled with chips and loose stones before grouting.

The face stone will be pitched to line at the joints, the faces being left rough, as they came from the quarry, unless the projections above the draft exceed three (3) inches, in which case they shall be roughly scabbled off to that limit.

Each course shall be laid in mortar, composed of one part fresh hydraulic cement, of approved quality, to two parts of sharp river sand, and after the backing of each course has been leveled off, and filled up, it shall be thoroughly grouted with hydraulic mortar in the above proportions.

The stone of the two (2) channel piers, and two (2) piers contiguous to the same, shall be limestone, of quality to be approved by the engineer.

224 The other piers, abutments, and retaining walls of approaches, may be built from above high water, of sound, durable sandstone, or freestone that will resist the action of frost and weather.

All the piers will be coped with dressed stone, of thickness not less than eighteen (18) inches on river piers, and twelve (12) inches on land piers.

The cut-waters of river piers shall be dressed to a smooth and even surface, and fastened together with iron clamps or dowels at the usual level of ice floods, and four (4) feet above and below that level.

Coping will also be clamped with iron clamps.

Proposals for masonry may include all the foundations, masonry of piers, and retaining walls, and all expenses of preparing and sinking foundations.

Proposals may also be made for the masonry, exclusive of the foundations, and sinking or preparing the same.

EXHIBIT No. 2.

This agreement, made and concluded this 9th day of October, 1868, between G. C. Franciscus, of the city of Philadelphia, State of Pennsylvania, of the first part, and George A. Smith & Co., of the city of Cincinnati, State of Ohio, of the second part, witnesseth: That the said parties of the second part agree to furnish all the materials and construct the masonry of the Newport and Cincinnati bridge, at such point across the Ohio River as may be designated by the engineer of the bridge company, J. H. Linville, or his successor in office, according to the specifications hereto attached, marked A, and to do the work within a reasonable time, and in a workmanlike manner, subject to the inspection and approval of said J. H. Linville, esq., chief engineer, or his successor as aforesaid.

And the parties hereto further agree, that all matters of difference arising between them, in relation to said work, shall be referred to said chief engineer, or his successor, and that his decision and award shall be final and conclusive.

The said party of the first part, in consideration of the foregoing, agrees to furnish yard-room for stone at the bridge site, and to pay said party of the second part, as follows: For work done and material furnished—limestone masonry, $20 (twenty dollars) per perch of
225 twenty-five (25) cubic feet; sandstone masonry, $18 (eighteen dollars) per perch of twenty-five cubic feet; sandstone masonry, $18 (eighteen dollars) per perch of twenty-five cubic feet, as aforesaid.

Foundations at cost of labor, materials, and superintendence.

Said party of the first part further agrees to pay said party of the second part in monthly estimates, to be made by the chief engineer or his assistant, for work done, material delivered at bridge site, and got out in quarry, at the relative value thereof, retaining ten per cent. until the final completion of the work, and upon the full and faithful completion thereof to pay in full rates heretofore specified.

It is mutually agreed and understood that no percentage is to be retained on account of work and material used in foundations.

GEO. A. SMITH & CO.
G. C. FRANCISCUS.

In presence of:
ALFRED GAITHER,
W. S. COTTRINGER.

Specifications for masonry, Newport & Cincinnati bridge.

The piers in the channel of the river will be founded on the rock, if rock bottom can be reached at reasonable depth; otherwise on a hewn timber grillage, or on piles below the level of low water. In foundations above low water the piers will be founded on a bed of concrete two (2) feet in thickness; the depth to which the foundations of the piers must be sunk, and the character and fitness of the foundations, will be determined by the engineer in charge of the works.

The masonry must be rock range-work; the stones must be accurately squarred, jointed and bedded, and laid in courses of not less than twelve (12) inches thick, nor exceeding thirty (30) inches in thickness, regularly decreasing from bottom to top of pier. All face stones are to have a bed equal to once and a half the perpendicular face or rise.

Stretchers shall not be less than five (5) feet in length; header shall be long stone, not less than five (5) feet in length, and shall hold the size in the heart of the wall that they show in the face, and must be so arranged as to occupy from one-sixth to one-fifth of the entire face, and be similarly disposed in the back of thick walls; when the thickness of the wall will admit of their interlocking, they must be disposed in that manner.

In thicker walls stones not less than four (4) feet in length will be placed transversely in the heart of the wall, to connect the opposite sides or bond the backing.

226 The stones used for backing must be well shaped, large stones, of the same thickness usually as the face stones. They must be bedded solidly without spawls or underpinning, and scabbled off to secure a good bond with the headers. All interstic's between the backing to be filled with chips and loose stones before grouting.

The face stone will be pitched to line at the joints, the faces being left rough as they came from the quarry, unless the projections above the line exceed three (3) inches, in which case they shall be roughly scabbled off to their limit; each course shall be laid in mortar, composed of part fresh hydraulic cement of approved quality to two parts sharp river sand; and after the backing of each course has been leveled off and filled up it shall be thoroughly grouted with hydraulic mortar in the above proportions.

The face stone of the two (2) channel piers, and two piers contiguous to the same, shall be limestone, of quality to be approved by the engineer. The backing may be sound, strong sandstone.

The other piers and retaining walls of approaches may be built of sound, durable sandstone, or freestone that will resist the action of frost and the weather.

Limestone facing to be used in all portions of piers and abutments exposed to ice flow.

All the piers will be coped with dressed stone, of thickness not less than eighteen (18) inches on river piers, and twelve (12) inches on land piers. The cut waters of river piers shall be dressed and fastened together with iron clamps or dowels at the usual level of ice floods, and four (4) feet above and below that level.

Coping will also be clamped together with iron clamps.

Proposals for masonry may include all the foundations, masonry of piers, and retaining walls, and all expense of preparing and sinking foundations.

Proposals may also be made for the masonry, exclusive of the foundations, and sinking or preparing the same.

(Signed) J. H. LINVILLE,
Chief Engineer.

227 EXHIBIT H. C. S., G.

Amount expended to March 3d, 1871		$1,220,781 24
From which deduct amount realized from sale of real estate sold that was not required for bridge	$305,576 99	

And amount refunded by Pittsburgh, Cincinnati & St. Louis Railway Co. for expenditures on account of real estate, trestle and railway superstructure eastward of Eggleston avenue, included in above	73,700 36	379,277 35
Actual amount expended to March 3d, 1871, chargeable to cost of completed work		*$841,503 89
Amount expended to completion of bridge		$1,688,894 70
Amount expended after March 3, 1871, in construction of bridge		$847,390 81

EXHIBIT H. C. S., H.

This agreement, made this 6th day of October, A. D. 1868, between the Newport and Cincinnati Bridge Company, of the first part, and G. C. Franciscus, of Philadelphia, Pa., of the second part, witnesseth:

That for and in consideration of certain bonds, stock and money, to be hereinafter named, the said party of the second part agrees to construct, and complete, and deliver to the party of the first part, within a reasonable time, a bridge, ready for use, over the Ohio River between Cincinnati and Newport, as described below, viz:

A first class patent wrought iron railway bridge, thirteen feet in the clear between trusses, with two roadways, each ten feet in clear width, suspended one on each side of the railway bridge. The railway bridge to be proportioned for a variable load of 3,000 pounds per lineal foot, the roadways to sustain each a variable load of 75 pounds per superficial foot of surface, with all needful guards and shields for carriages; separate footwalk, with heavy baluster or outside railing; also, the right of way, and construction of suitable approaches to the bridge.

228 The masonry to be rock-range work laid in cement, and placed on reliable foundations. The face stone of piers to high water mark to be limestone, other stone to be suitable sand or freestone. All materials and workmanship to be of the best quality, and in accordance with the plans and specifications hereto attached, and subject to the approval of J. H. Linvill as chief engineer.

The said party of the first part, for and in consideration of the construction and completion of the bridge, as stated above, agree to deliver to the party of the second part $1,000,000, first mortgage bonds of the said Newport and Cincinnati Bridge Company, bearing seven per cent. interest (clear of taxes); $200,000 of the second mortgage bonds of the said Newport and Cincinnati Bridge Company, bearing seven per cent. interest (clear of taxes); ten thousand eight hundred shares (full paid) of the capital stock of the said Newport and Cincinnati Bridge Company, and the proceeds that may be derived from the remaining assessment upon the twelve hundred shares of the capital stock of said company. The said bonds and shares of the capital stock of said company to be delivered to the party of the second part as follows:

1st. In order to meet the outlays for right of way and preparing material, one hundred thousand dollars of the bonds shall be advanced to the contractor.

2d. As the work progresses, bonds at par shall be paid over monthly

*The amount $841,503.89 does not include retained percentage due contractors or outstanding bills prior to March 3, 1871.

to the amount of estimates of chief engineer, and 60 per cent. of the stock; the remaining 40 per cent. of stock shall be held by the company until final completion and delivery of bridge by the contractor, when it shall be paid over to him upon the certificate or final estimate of the chief engineer.

It being further understood and agreed that the twelve thousand shares of stock, as set forth in this agreement, constitutes the entire capital stock of this company, and the same shall not be increased without the consent, in writing, of said G. C. Franciscus.

In testimony whereof said Newport and Cincinnati Bridge Co. has caused its corporate seal to be hereto affixed and the signature of Alfred Gaither, its president, to be hereto subscribed, and said G. C. Franciscus has hereto set his hand and seal the day and year first above written.

(Signed) ALFRED GAITHER,
[SEAL OF COMP'Y.] *Pres. Newport & Cin. Bridge Co.*
(Signed) G. C. FRANCISCUS.

Witness present:
(Signed) HENRY C. SPACKMAN.

229 EXHIBIT H. C. S., I.

This agreement, made and concluded this 9th day of October, 1868, between G. C. Franciscus, of the city of Phiadelphia, State of Pennsylvania, of the first part, and Geo. A. Smith & Co., of the city of Cincinnati, State of Ohio, of the second part, witnesseth:

That the said parties of the second part agree to furnish all the material and construct the masonry of the Newport and Cincinnati bridge, at such point across the Ohio River as may be designated by the engineer of the bridge company, J. H. Linnville, or his successor in office, according to the specifications hereto attached marked "A," and to do the work within a reasonable time, and in a workmanlike manner, subject to the inspection and approval of said J. H. Linnville, esq., chief engineer, or his successor, as aforesaid. And the parties hereto further agree that all matters of difference arising between them in relation to said work shall be referred to said chief engineer or his successor, and that his decision and award shall be final and conclusive.

The said party of the first part, in consideration of the foregoing, agree to furnish yard room for stone at the bridge site, and to pay said party of the second part as follows, for work done and material furnished: limestone masonry, ($20) twenty dollars per perch of twenty-five (25) cubic feet; sandstone masonry, $18 per perch of 25 cubic feet, as aforesaid.

Foundations at cost of labor, materials, and superintendence.

Said party of the first part further agrees to pay said party of the second part, in monthly estimates, to be made by the chief engineer or his assistant, for work done, material delivered at bridge site, and got out in quarry, at the relative value thereof, retaining ten per cent. until the final completion of the work, and upon the full and faithful completion thereof, to pay in full at the rates heretofore specified.

It is mutually agreed and understood that no percentage is to be retained on account of work and material used in the foundations.

(Signed) GEO. A. SMITH & CO.
(Signed) G. C. FRANCISCUS.

In presence of—
(Signed) ALFRED GAITHER.
(Signed) W. S. COTTINGER.

230 A.

Specifications for masonry, Newport and Cincinnati Bridge.

The piers in the channel of the river will be founded on the rock, if rock bottom can be reached at reasonable depth; otherwise on a hewn timber grillage, or on piles below the level of low water. In foundations above low water the piers will be founded on a bed of concrete, two (2) feet in thickness. The depth to which the foundations of the piers must be sunk, and the character and fitness of the foundations, will be determined by the engineer in charge of the works.

The masonry must be rock-ranged work. The stones must be accurately squared, jointed, and bedded, and laid in courses of not less than twelve (12) inches thick, nor exceeding thirty (30) inches in thickness, regularly decreasing from bottom of top of pier. All face stones are to have a bed equal to one and a half the perpendicular face or rise.

Stretchers shall not be less than five (5) feet in length, and shall hold the size in the heart of the wall that they show in the face, and must be so arranged as to occupy from one-sixth to one-fifth of the entire face, and be similarly disposed in the back of thick walls.

When the thickness of the wall will admit of their interlocking, they must be disposed in that manner.

In thicker walls, stones not less than four (4) feet in length will be placed transversely in the heart of the wall, to connect the opposite sides or bond the backing.

The stones used for the backing must be well shaped, large stones, of the same thickness usually as the face stones. They must be bedded solidly, without spawls or underpinning, and scabbled off to secure a good bond with the headers. All interstices between the backing to be filled with chips and loose stones before grouting.

The face stone will be pitched to line at the joints, the face being left rough as they came from the quarry, unless the projections above the line exceed three (3) inches, in which case they shall be roughly scabbled off to that limit. Each course shall be laid in mortar composed of one part hydraulic cement, of approved quality, to two parts sharp river sand, and after the backing of each course has been leveled off and filled up, it shall be thoroughly grouted with hydraulic mortar in the above proportions.

The face stone of the two channel piers, and two piers contiguous to the same, shall be limestone, of quality to be approved by the engineer.

231 The backing may be sound, strong sandstone.

The other piers and retaining walls of approaches may be built of sound, durable sandstone or freestone that will resist the action of frost and the weather. Limestone facing to be used in all portions of piers and abutments exposed to ice flow.

All the piers will be coped with dressed stone of thickness not less than eighteen (18″) inches on river piers, and twelve (12″) inches on land piers. The cutwaters of river piers shall be dressed, and fastened together with iron clamps or dowels at the usual level of ice floods and four (4′) feet above and below that level; coping will also be clamped together with iron clamps.

Proposals for masonry may include all the foundations, masonry of piers and retaining walls, and all expense of preparing and sinking foundations.

Proposals may also be made for the masonry exclusive of the foundations and sinking or preparing the same.

(Signed) J. H. LINVILLE,
Chief Engineer.

EXHIBIT H. C. S., K.

This agreement tripartite, made the fifteenth day of February, in the year of our Lord one thousand eight hundred and seventy-one, between "the Newport and Cincinnati Bridge Company," of the first part, Sallie B. Franciscus and Albert H. Franciscus, administrators of the estate of George C. Franciscus, late of the city of Philadelphia, deceased, of the second part, and Henry C. Spackman, also of the city of Philadelphia, of the third part:

Whereas a certain contract or agreement in writing was made and entered into by and between the said party of the first part and the said George C. Franciscus, in the lifetime of the latter, dated the sixth day of October, A. D. 1868, whereby the said Geo. C. Franciscus did agree to construct, finish, and deliver unto the said party hereto of the first part, a bridge over the Ohio River, between Cincinnati and Newport, for which the said party of the first part stipulated to pay and deliver to him the consideration therein mentioned, at the times and in the way and manner therein specified, as by reference to the said recited contract will more fully appear;

And whereas the said George C. Franciscus hath since died intestate, having in his lifetime partially fulfilled said contract on his part and received a part of the consideration stipulated to be paid and de-
232 livered to him as aforesaid, and the said parties hereto of the second part have been duly appointed and qualified as administrators of his estate according to law;

And whereas it has been mutually agreed by all the parties hereto that the said party hereto of the third part shall be substituted in the place and stead of the said George C. Franciscus, and in his stead and place do, perform, and finish all matters and things remaining to be fulfilled on his part in order fully to complete and carry out the said recited contract on the part of him the said George C. Franciscus; and further in his place and stead to receive all the consideration remaining to be paid and delivered by the said the party of the first part in execution of said contract on their part; and that the said George C. Franciscus and his said administrators and his estate shall be absolved and forever released from all liabilities, claims or demands for or by reason of the said contract, or in any wise arising from a growing out of the same, as hereinafter more fully set forth:

Now, in consideration of the premises and the sum of one dollar by each of the parties hereto to each of the other parties hereto paid at the execution hereof, the receipt whereof is hereby acknowledged, it *it* is mutually covenanted, granted and agreed by and between each and all of the parties hereto, their respective successors, heirs, executors, administrators and assigns, as follows:

1. That the said party of the third part shall be, and he is hereby, substituted in all respects in the place and stead of the said George C. Franciscus, under the contract hereinbefore recited, with like effect and to the same extent in all respects as if the said contract had been made, signed, and executed by and between the said party of the first part hereto and the said party hereto of the third part instead of by and between the said party hereto of first part and the said G. C. Franciscus,

and the several the rights, remedies, duties and liabilities of the respective parties hereto of the first and third parts under the said recited contract, and arising or in any wise growing out of the same, so far as the same remain unfulfilled, shall remain in full force and unimpaired as between them in like manner and in all respects as if the said party of the third part had made, signed and executed the said contract instead of the said George C. Franciscus.

2. That so far as may be necessary to effectuate and carry out the true spirit and intention of this present agreement, the said parties hereto of the second part do assign, transfer, and set over the said recited contract, and all its benefits and advantages, unto the said party of the third part hereto, his executors, administrators and assigns,
233 and so far as may be requisite or proper to enable him to act as the substitute of the said George C. Franciscus, deceased, in all matters pertaining to the said contract and remaining to be fulfilled, do constitute him their attorney in fact, but for his own account, use and benefit.

3. That the said parties hereto of the second part and the said George C. Franciscus, and his estate, shall by these presents be and remain forever hereafter relieved, released, exonerated, and discharged of and from the said contract and all duties, liabilities, covenants, and stipulations under the said recited contract, and all claims and demands arising or in any wise growing out of the same as fully and completely in all respects as if he had never been a party to or executed the same, and no obligation or duty to account for any part of the consideration mentioned therein which may have been paid or delivered to him in his lifetime shall remain after the execution of these presents.

In witness whereof the said party hereto of the first part hath caused to be hereunto affixed their common or corporate seal, attested by the signature of their president; and the said parties hereto of the second and third parts have hereunto set their respective hands and seals on day and year first above written.

(Signed) THE NEWPORT & CINCINNATI BRIDGE CO.,
[SEAL OF C'MP'Y.] By ALFRED GAITHER, *Pres't.*

Sealed and delivered in the presence of us by the parties of the first part.

(Signed) C. S. COVE.
L. H. ABRAMS, JR.

(Signed) S. B. FRANCISCUS. [L. S.]
(Signed) A. H. FRANCISCUS, *Ad.* [L. S.]
(Signed) HENRY C. SPACKMAN. [L. S.]

Sealed and delivered in the presence of us by the parties of the second and third parts.

(Signed) WM. M. SPACKMAN.
S. S. FRANCISCUS.

234 EXHIBIT H. C. S., L.

Whereas the Newport and Cincinnati Bridge Company entered into a contract with George C. Franciscus, of Philadelphia, on the 6th day of October, 1868, for the construction of the bridge of said company; and

Whereas the change of the law of Congress authorizing the building

of the Newport and Cincinnati bridge will add largely to the amount originally contemplated as the cost of the same; and

Whereas said company did, on the 14th day of March, 1871, assent to the substitution of Henry C. Spackman as the contractor for the construction of said bridge and as the successor and assignee of said George C. Franciscus, deceased, and further assented to the release and discharge of said Franciscus and his estate from all liability growing out of said contract of October 6, 1868; and

Whereas said company, on the 30th day of May, 1871, by a resolution of the board of directors thereof, authorized the abrogation of the existing contract with said Spackman and the issue and delivery to him of the balance of the capital stock of the company that would be due to him on the completion of said contract, provided the assent, in writing, of the holders of two-thirds of the capital stock already issued be first obtained to said abrogation of contract and issue and delivery of stock and filed with the company; and

Whereas such assent of stockholders has been obtained and filed with said company: Now, therefore,

This agreement, made the 22d day of June, 1871, between the Newport and Cincinnati Bridge Company, of Ohio and Kentucky, of the first part, and Henry C. Spackman, of Philadelphia, Penn., successor to George C. Franciscus, of said city of Philadelphia, contractor for building the bridge of said company, party of the second part, witnesseth:

First. The party of the first part, in consideration of the undertaking of the Pennsylvania Railroad Company to furnish the money required to meet the contracts and obligations of said party of the second part as they exist at the date hereof, and to complete the bridge of said party of the first part now in course of construction, the amount of money so furnished to form an indebtedness on the part of the party of the first part hereto unto the said Pennsylvania Railroad Company, hath abrogated and set aside the contract made with George C. Franciscus
235 on the 6th day of October, 1868, and transferred to Henry C. Spackman on the 14th day of March, 1871, as in the preamble hereto duly set forth; and the said party of the first part doth hereby relieve and release the party of the second part from any and all liability to them on account of said contract, assuming for themselves the obligations of the party of the second part and his predecessor to the Pennsylvania Railroad Company for all moneys advanced to him or them in excess of the sum of one million two hundred thousand dollars, and also the contracts entered into by said party of the second part and his predecessor, for real estate, labor, and materials used or to be used in locating and constructing the Newport and Cincinnati bridge, in so far as they remain incomplete or unsatisfied at the date hereof.

Second. The party of the second part, in consideration of the issuing and delivery unto him of certificates representing forty-three hundred and twenty shares of the capital stock of the Newport and Cincinnati Bridge Company, the reception of which is hereby acknowledged, and the assumptions of the party of the first part, doth hereby agree to the abrogation of the contract hereinbefore described, and fully discharges the said party of the first part hereto from, and guarantees them against, any and from all liability and obligations of every kind or nature other than is herein assumed by the party of the first part, arising from or growing out of the contract made with George C. Franciscus, and now abrogated and set aside.

In testimony whereof, the party of the first part have caused the signature of their president, attested by their corporate seal, to be affixed hereto, and the party of the second part has hereunto attached his signature, on this 22d day of June, 1871.

(Signed) ALFRED GAITHER,
[SEAL OF C'MP'Y.] *Pres't Newport and Cincinnati Bridge Co.*
(Signed) HENRY C. SPACKMAN.

Witness to signature of H. C. Spackman:
(Signed) ALBERT HEWSON.

236 THE STATE OF OHIO,
Hamilton County, ss:

Circuit court of the United States, S. D. O., No. 1729.

THE NEWPORT AND CINCINNATI BRIDGE CO.
vs.
THE UNITED STATES.

The defendant will take notice that on Monday, the 15th day of November, A. D. 1875, the plaintiff above named will take the depositions of sundry witnesses, to be used as evidence on the trial of the above cause, at the law office of Sage & Hinkle, 14 Masonic Temple, Cincinnati, in the county of Hamilton, in the State of Ohio, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day between the same hours, until they are completed.

MATTHEWS, RAMSEY & MATTHEWS,
Attorney for Plaintiff.

Service of the above notice is acknowledged, and proof of the official character of the officer before whom the said depositions may be taken is by agreement waived, also all exceptions in regard to time.

WARNER M. BATEMAN,
United States Attorney.

GEORGE A. SMITH, being first duly sworn, deposes and says as follows in answer to interrogatories propounded by George R. Sage, esq., of counsel for plaintiff.

Q. 1. Please state your residence and occupation.

A. I reside in the city of Cincinnati and my occupation is that of contractor.

Q. 2. Did you have anything to do with the construction of the Newport and Cincinnati bridge? and if anything, state what.

A. I was contractor for the erection of masonry of the Newport and Cincinnati bridge, and had charge of the construction of masonry from the beginning until it was completed.

Q. 3. What was the condition of the masonry of said bridge at the time when the work was suspended by authority of the United States?

A. Diagram No. 2, Exhibit No. 1, attached to the original bill in this cause—that is the diagram showing work completed March 1, 1871—represents correctly the condition of the work when it was suspended prior to the adoption of the plan according to which the bridge was completed. The masonry and brick arches on the Cincinnati side were
237 completed; the first three piers were completed; pier No. 4 complete, except part of the coping; pier No. 5 built to within eleven feet nine inches of completion; the pivot pier, or pier No. 6,

built to within ten feet nine inches of the required height; piers No. 7, 8, and 9 were completed, and all the masonry on the Newport side was completed, that is, approaches and archways; material prepared for setting and completing the work was here ready to be laid as soon as the weather permitted.

At this point adjourned till Tuesday, November 16th.

CHARLES C. DAVIS,
Notary Public.

FRIDAY, *January* 21, 1876.

Taking of depositions under the notice hereto attached was, by consent of parties, postponed from day to day from the 16th day of November, 1875, until this date.

CHARLES C. DAVIS,
Notary Public.

JANUARY 21ST, 1876.

GEORGE A. SMITH appeared and continued his deposition as follows:

Q. 4. Please state fully and in detail what changes you made in the masonry, and what work you did after the suspension of work alluded to in your testimony above, and for the purpose of completing the masonry according to the plans furnished under the act of Congress relating to the reconstruction of said bridge.

A. These matters are set out fully, accurately, and truly in the petition filed in the court of common pleas, of Hamilton County, Ohio, in case No. 39415 on the docket of said court, wherein George A. Smith & Co. were plaintiffs and the Newport and Cincinnati Bridge Company and J. Edgar Thomson were defendants; the facts stated in that petition were furnished by me; the petition was prepared at my instance and was verified by me, and the portion of it to which I now refer is that portion beginning near the foot of page 6, as follows:

"Plaintiffs were required to, and did proceed to reconstruct said piers, by tearing down pier No. 1 to its foundation," etc., and from thenceforward down to the beginning of the last sentence but one on page 7, that is to say, down to the sentence on page 7 beginning as follows:

"Plaintiffs further state that in the construction of the river piers under the second plan aforesaid," etc., and I hereby adopt said statement as my testimony herein, and make it part of this my deposition.

(The extract from the petition referred to is hereto attached, marked Exhibit A, and made part hereof.)

The second plan mentioned above was the plan which was
238 being carried to completion when the work was suspended on the 1st of March, 1871, and the third plan referred to in said petition was the plan according to which the bridge was finally completed.

By the third plan above referred to the batter of the piers was changed. The batter under the second plan is correctly stated in said petition, in the paragraph beginning near the foot of page 4 and extending to page 6.

(The extract here referred to is hereto attached and marked Ex. B, and made a part hereof.)

As I now remember, the batter under the second plan was a half inch

to the foot for all the work—a uniform batter for all the work—that I am positive of. The batter under the third plan varied from one-eight' of an inch to three-eight's of an inch.

Q. 5. At the time of the last change of plan, state whether the plan of the approaches and the abutments was changed; if so, how and what changes were made, and what work was done?

A. The plans for the approaches and abutment piers, on the Ohio side, were totally changed, and the entire foundations taken out and rebuilt, and the superstructure built thereon was entirely different in character, higher, more elaborate and more expensive work.

Q. 6. Please describe fully and in detail the changes last above referred to, and state what necessity, if any, there was to make them; and whether there was any change in the location or position of the abutment piers or approaches on the Ohio side; and, if so, what they were?

A. The foundations were made larger and deeper and built, as we term it, "askew"—that is, at an angle with the piers of the bridge. It was necessary to make them larger and place them deeper to support the new superstructure, which, on account of the increased height of the bridge, had to be heavier. They were placed askew, because by reason of the increased height of the bridge it became necessary to make the approach by a curve in order to reach the depot grounds. The brick archways on the Ohio side were torn down to the foundation stones and rebuilt, and much larger archways of brick substituted at a very materially enchanced cost. These were rendered necessary by the increased height of the bridge. The archways constructed under the second plan were built upon very light centers of one inch boards and of about fourteen to sixteen feet span. The archways under the third plan required centers of oak timbers twelve by twelve—some of them forty feet in length. They had to be regularly framed and were about thirty feet span, and thirty to forty feet in height, and we had to
239 use three-inch plank for sheeting. Those large arches necessitated the using of a large amount cut stone for askew backs, string courses, coping, quoins, lamp-posts, etc., over and above what were required in the second plan. The askew backs for the third plan had to be cut out of very large stones. From the great weight of the arch it became necessary, when there was an arch on each side of a pier, that the askew backs should extend back into the pier until they rested against and supported each other, in which case they were called stretchers, or they extended clear through the pier, beveled on each end. Those were headers. This necessitated the use of a greater number of large stones.

Q. 7. Please explain why a larger amount of string courses coping, quoins, and lamp-posts became necessary, and what effect putting them in had upon the cost and labor.

A. There were quoins cut for one of the piers, being abutment pier B, Exhibit No. 2, attached to the bill, on each corner, for about thirty feet in height. There was also a large amount of coping. The necessity for this arose from the following facts: Under the second plan the approaches came to grade at the south side of Front street, but when the bridge was raised as in the third plan, the approaches, both for the wagon-ways and the railways, had to be carried over and across Front street; then the roadway approach extended in the general direction of the bridge itself on up towards Pearl street, being the next street north of Front street, and about two hundred feet distant therefrom, and came to grade about half way between Front and Pearl, while the railway

approach had to be by a curve at a higher level towards the east, and did not reach grade (or the level of the street) until it passed to a point about eight hundred feet above the bridge. It therefore became necessary to build parapet walls for the roadway to where it struck grade, and to cope them with eight-inch coping.

Adjourned by consent to Wednesday afternoon, January 26th, 1876, at 3 p. m.

CHAS. C. DAVIS.

Three p. m., Wednesday, January 26th, 1876, met pursuant to adjournment, and resumed taking of depositions.

Q. 8. Please state of what material these lamp-posts referred to by you were made, and what were the general features of their construction?

A. Two of them were cut of limestone, the others out of Buena Vista freestone. They were cut octagon, about three feet in diameter at the base; they were cut in sections, with bases, plinth, and caps; moulded and chamber projections. They were about four feet six inches high.

240 Q. 9. How many large arches were there; I mean of those substituted for the small ones of the second plan?

A. Nine. Exhibit No. 2, attached to the bill, shows three archways between Front street and abutment B, but each one of those archways as shown represents three between the same abutment piers, being one for the railway track (which is shown in the exhibit by little arched projections above the side arches) and one arch on each side for the roadways. Then on the north side of Front street there are two archways which support the roadway, which is there double width, and the roadways diverge south of that point so as to pass one on each side of the railway track on the bridge.

Q. 10. Now, passing to the Kentucky side, what changes in the abutments and the approaches became necessary by reason of the adoption of plan three, and the construction of the bridge accordingly? Please state explicitly and fully.

A. The piers or abutments had to be raised to correspond with the increased height of the bridge. The coping of the roadways had to be removed, the structure raised and the coping replaced. The grade ascended under the second plan 0.24 feet per hundred feet; that is, nearly three inches. Under the third plan the grade ascended two feet per hundred feet. The result was that the stone used under the second plan had to be taken out and recut to a new bevel corresponding with the increased grade, or new stone cut to the true bevel substituted. This was necessary to enable us to place the coping according to the grade of the third plan. The work of recutting was laborious and expensive, and necessitated the waste of a good deal of material. These approaches had all been finished under the second plan, and where work is done by the perch, as in our contract, such a change involves at the same time loss of material and greatly enhances cost.

Q. 11. Please state what was your contract with the bridge company, and if it was in writing; attach a copy.

A. My contract was made with George C. Franciscus, on the 9th of October, 1868. It was in writing, and I attach hereto a copy, marked Exhibit "C"; I attach also, as a part of said exhibit, specifications for masonry referred to in the contract; that contract was afterward, that is, on the 15th of February, 1871, assumed by Henry C. Spackman, by an agreement between him and the administrators of George C. Fran-

ciscus, who died a short time before that date; and on the 30th of May, 1871, the bridge company, with the consent of its stockholders, released Spackman from the contract, and assumed all its obligations.

Q. 12. What was Franciscus' relation to the construction of the bridge when you entered into the contract with him?

241 A. My understanding was that he had undertaken to build the bridge for the company, and all contracts for masonry and superstructure were to be made with him.

Q. 13. Please state whether at or after the suspension of the work under the second plan, or the adoption of the third plan, any new agreement or contract was made by you for the construction of the masonry of said bridge; if so, state fully and particularly what it was, and when, and with whom it was made.

A. There was no new agreement. On the 3d of April, 1869, I had notified Mr. Wilson, the engineer of the bridge company, that I could not proceed under the second plan without increased compensation; a copy of that letter is hereto attached, marked Exhibit D, and made part hereof. The third plan, involving changes as I have testified, also made an increase of compensation necessary; and, the general understanding was, as under the second plan, that I should have such increased compensation as would secure for me the same margin of profit as under the original contract and specifications, of October 9th, 1868; that is to say, I was to be paid by the perch at such increased price in view of the changes in the character of the work as would make my compensation as valuable to me as if the original contract had been carried out according to its terms; and for all work not to be paid for by the perch I was to be paid such increased compensation as would be just and fair, taking the original contract price as the standard, and comparing the work required by the original contract with the work rendered necessary by the change of plan.

Q. 14. State whether there was any arrangement or understanding to refer the question of increased compensation to Edgar J. Thomson; and, if so, what that arrangement was?

A. There was an understanding to that effect; that is, I was to receive full value for my work, the price to be settled by the engineer in charge and myself; and in case we could not agree on a price the whole matter was to be referred to Edgar J. Thomson, or rather J. Edgar Thomson, which was his correct name.

Q. 15. What interest, if any, had J. Edgar Thomson at the time in the bridge company?

A. I did not know of any interest that he had in the bridge company at that time.

Q. 16. State whether afterward and before the completion of the work under the third plan his relation to the bridge company changed; and if so, how?

A. On about the 22d of June, '71, the Pennsylvania Railroad
242 Company, of which J. Edgar Thomson was president, assumed the obligation of Henry C. Spackman, who had succeeded George C. Franciscus as contractor for building the bridge, and undertook to complete the same according to the changes required by the act of Congress. Mr. Thomson therefore ceased to be a disinterested person or competent to be referee.

Q. 17. When you agreed to complete the masonry according to the third plan, was anything said about a reference to J. Edgar Thomson?

A. No, sir; there was only the understanding that I was to be paid for the work such increased compensation as would be just and proper,

in view of the original contract taken as the standard, and the increased labor and expense incident to the change or changes that might be requisite under the third plan. At that time we did not know exactly what would have to be done, nor what difficulties would arise, and it was impossible to fix any more definitely the measure of compensation.

Q. 18. How long did Mr. Thomson live after the adoption of the third plan?

A. I do not know. He died before the completion of the work.

Q. 19. Now please state whether there were any special difficulties in constructing the piers under the third plan; and if so, what they were, including, also, a statement of what was done in the way of taking down the piers constructed according to the second plan.

A. There were many special difficulties resulting from that change. In the first place, in taking down the river piers, new derricks of peculiar form had to be built, boats provided, and on account of the rapid current and deep water about the piers, it was almost impossible to hold the boats in position. It was almost impossible to guy the derricks securely and safely, because they had to be placed on top of the piers, which were too small to furnish space for so securing the derricks that the men would be assured of their safety. The men had to loosen the stone by leaning over and prying up with bars, and so loosen them that we could get hold of them with our grab hooks, and in lowering *the* them down to our boats, a number of extra men were necessary to bear the stone away from the pier while being lowered. The men were constantly in terror lest the strain upon the derrick should cause the fastenings to give way, and bring the whole thing down upon them. On account of the batter of the pier (the diameter of the pier at the base being six or seven feet greater than at the top), and coffer-dam at
243 the base of the pier, and the fact that the boats had to be six or seven feet clear of the coffer-dam, it was necessary to swing the stone out to keep clear from the piers, and the strain upon the mast of the derrick was so great as to sway it back and forth, so that there was great danger of its giving way and falling. So great was the fear of the men that we had to dispense with these derricks and substitute others of different character altogether, which were bolted and fastened on the outside of the pier. Those derricks had to be taken down and lowered every few feet, drilling new holes and bolting them to the pier, which was very expensive, slow, and dangerous work, and I consider that it was much more expensive and dangerous to take it down than the building in the first place.

When we lowered a stone into one end of the boat it bore her down so in the water by the time we loaded two or three in we had to change the position of the boat so as to load at the other end to keep her trim. Each boat had to be towed ashore, unloaded, the stones recut to change of batter, reloaded, and towed back again before resetting. Other piers, 6, 7, 8, and 9, for instance, the iron superstructure of which was in place when they were rebuilt, the iron superstructure had to be raised by hydraulic jacks, and the work of rebuilding of said piers had to be done under said superstructure. All this involved delay, and great extra labor and cost.

Q. 20. Your original contract provides payment for work done and material furnished—limestone masonry, $20 per perch of twenty-five cubic feet; and sandstone masonry, $18 per perch of twenty-five cubic feet.

State about what was the proportion of each to the entire masonry, and what effect that proportion had upon the profits of the work.

A. My estimate of the quantity of limestone in piers 1 to 9 inclusive was $7,519\frac{73}{100}$ perches, and $19,183\frac{03}{100}$ sandstone, and the Newport approaches $4,251\frac{56}{100}$ perches of sandstone; and $6,138\frac{12}{100}$ perches sandstone in the Cincinnati approaches, making a total, limestone, $7,519\frac{73}{100}$ and sandstone $29,572\frac{71}{100}$ perches, grand total, $37,092\frac{44}{100}$.

The sandstone masonry, excepting in the approaches, was used for backing, and the large quantity, as compared with the limestone, furnished the basis for the profit on the job. The limestone masonry was not profitable, but the profit was in the sandstone or backing.

Q. 21. What amount of limestone masonry did you furnish and lay under the last plan, and what amount of sandstone masonry?

244 A. In piers 1 to 9 inclusive, $2,305\frac{18}{100}$ perches of limestone and 827 perches of sandstone; there were $3,881\frac{66}{100}$ perches of sandstone in the Cincinnati approaches and $158\frac{78}{100}$ perches of sandstone in the Newport approaches, and $30\frac{50}{100}$ perches in the pedestals; making a total of sandstone of $4,897\frac{94}{100}$ perches, and grand total, sandstone and limestone, $7,203\frac{12}{100}$ perches.

Q. 22. What amount of brick masonry was furnished and laid by you under the last plan?

A. $3,395\frac{03}{100}$ perches.

At this point adjourned to Tuesday, February 1st, 3 p. m.

CHAS. C. DAVIS,
Notary Public.

Met pursuant to adjournment and renewed the taking of depositions.

Q. 23. Please state what additional compensation for the work done under the plans finally adopted would be necessary to pay you for increased labor and cost of the masonry as compared with masonry called for by the first plans; give your statement in detail, with the reasons therefor.

A. I consider that the limestone masonry was worth $15 per perch more than the limestone masonry originally contracted for; that the value of the sandstone masonry was worth $2 per perch more than the masonry contracted for in the first contract. I consider that the brick masonry furnished and laid by me under the second change of plan aforesaid was worth $5 per perch more than the brick masonry originally contracted for.

The reason for the enhanced value of the limestone masonry was the necessity of placing derricks of extra size on each of the piers; the number of changes in the position of the rigging; the extra height to which the piers had to be carried; the superior quality of the masonry necessitated by their extra height and without backing; the change in the character of the coping and its greatly increased quantity; the slow and tedious mode of laying the stone under the superstructure already placed on piers 7, 8, and 9, which caused great detention, adding greatly to the cost of work done according to the original plan. The change in the dimensions of the piers very materially affected the cost of laying the limestone masonry, and the diminished size of the piers largely diminished the amount of backing, which was of sandstone masonry.

Pier No. 1 was at the top of the foundation courses forty-six feet six inches in length and sixteen feet six inches thick. At the top, under the coping, it would have been forty feet long and ten feet thick. Under the last plan that pier was twenty-eight feet long at the bottom,
245 nine feet eleven inches thick, and at the top, under the coping, twenty-five feet long and six feet thick. That pier was torn down to the top of the foundation courses and rebuilt.

Pier No. 2 was torn down to a point forty-two feet above the foundation courses; at that point, under the original plan, it would have been forty-four feet two inches long and sixteen feet two inches thick; at the top forty feet long and twelve feet thick. As constructed it was twenty-seven feet four inches long and nine feet eight inches thick at the point forty-two feet above the foundation courses, and at the top, twenty-five feet and six inches long and seven feet ten inches thick.

Piers Nos. 3 and 4 were alike, that is, of the same shape and dimensions; they were torn down to a point fifty-two feet four inches above the foundations; at that point the original plans called for forty-four feet two inches length and seventeen feet two inches thickness, and at the top forty feet length and thirteen feet thickness. As constructed they were at fifty-two feet four inches above the foundation courses, twenty-seven feet three inches long, and eleven feet one inch thick; and at the top twenty-five feet six inches long and ten feet thick.

Piers Nos. 5 and 7 were of the same shape and dimensions.

Pier No. 6 was the round pier called for under the second plan; it was not in either the first plan or the third plan; it was taken down after the third plan was adopted, and one span of the bridge extended from pier 5 to pier 7. Piers 5 and 7 were torn down to a point forty-four feet and three inches above the foundation courses; at that point the original plan called for forty-three feet ten inches length, and fifteen feet ten inches thickness; at that point the pier, as constructed finally, was twenty five feet seven inches long, and ten feet three inches thick. At the top, under the original plan, those piers would have been forty feet long and twelve feet thick; as constructed finally, they were twenty-three feet six inches long and eight feet thick.

Pier No. 8 was taken down to a point sixty feet and six inches above the foundation courses; at that point it would have been, according to the original plan, forty-one feet six inches long and eleven feet six inches thick. Under the third plan it was at that point twenty-one feet six inches long and eight feet thick; at the top, under the original plan, it would have been forty feet long and ten feet thick. Under the final plan it was at the top seventeen feet four inches long and six feet six inches thick.

Pier No. 9, according to the original plan, would have been forty
246 feet long and nine feet thick at the top; according to the third plan, it was seventeen four inches long at the top and six feet six inches thick. Before the final plan was adopted the superstructure had been placed on these piers and also on pier 7. The superstructure had to be raised by hydraulic jacks, and the stone-work built underneath by a very slow and difficult and dangerous process. For instance, we would raise the superstructure resting on pier 7, say twenty inches, which was about as much as possible at one lift. Then we would slip the stones under, one by one, and fit them to their places until we could get a bearing for the bridge; then the jacks were removed to the next pier, and the same thing had to be done there; and then to the third pier, where the same thing was done. Then we had to come back to the first pier, and placing the jacks on the newly laid stone, raised the bridge again, fill up the spaces where the jacks stood at the previous lift, and complete the course; then we had to go to the other piers and in like manner complete the course there. Then we could come back and lift the bridge pier by pier for another course, and repeat the same process over and over until the piers were completed. The work of building was necessarily so slow by reason of the facts above stated, and further, on account of the necessity of raising the bridge so as not to throw it out of plumb,

and then to block it up before we could commence laying the stone; also by reason of the necessity to shift the grab hooks and attachments when the stone was brought up to the level of the course and we began to push it over rollers to its place; and then there was the difficulty of getting out the rollers from under the stone, and finally placing it in position, that sometimes we could not lay more than one or two stone a day.

There was an additional difficulty at piers 8 and 9; the immense weight resting upon those piers led to the fear that they might be crushed, and to prevent that, iron castings were bolted to each course, consisting of plates holding the corners and bolted through the piers to similar plates at the opposite corners; the stone had to be channelled out in every course, to make room for the rods or bolts, and this channelling had to be done after the stone were laid, and where there was very little room to work; that is to say, between the course and the rods and cords of the bridge. This whole work was so dangerous that several of my best men laid down their tools and refused to go on with it.

Q. 24. Can you state whether there was any necessity for making the piers under the third plan so small as they were, and what reason there was, if any, why they should not have been built as large as called for by the first plan?

247 A. The foundations under the second plan—that is, for the low bridge, were so much smaller than those called for by the first plan that if we had undertaken to construct the piers finally as large as under the first plan, we would have been compelled to tear down all the piers to the bottom and build anew. The foundation of pier No. 1 was begun according to the first plan and finished to the height of fifteen feet, and then built upon that according to the subsequent plans; that fifteen feet is all under water at ordinary stage; but an examination of that foundation and comparison with the others which were built according to the second plan will show to any one the difference I have referred to.

Q. 25. From what source do you derive your statement of the dimensions of the piers as you have given them?

A. The dimensions of the piers according to the original plan I have stated from drawings made in the course of preparation for the case in the court of common please of Hamilton county; I did not have the original plans, or a copy, in my possession, but the dimensions are substantially, if not exactly, correct as I have them in my memory, and as prepared from different working plans; the dimensions of the piers as they were finally constructed, I took from the working plans furnished me by the company.

At this point the further taking of depositions is adjourned, by consent, to May 17th, 1870, at 10 a. m.

CHAS. C. DAVIS, *Notary.*

Pursuant to adjournment, met May 17th, at 10 a. m., and resumed taking of deposition of GEORGE A. SMITH, Esq., as follows:

Q. 26. For the construction of the piers and masonry according to the final plan, did you use any stone other than that which had been used for the piers under the second plan? If so, state what new stone you used, and how much.

A. I am not able to state accurately how much new material was used, but about one-half of the material in the river piers was of new

stone; the other half of stone taken down from the old piers; the work in the approaches was all of new material.

Q. 27. How much of the stone that was taken down from the piers of the second plan did you use for the piers under the third plan?

A. About half.

Q. 28. What was done with the other half of the stone that was taken down from the piers under the second plan, and why was it not used for the piers under the third plan?

248 A. The most of it was used as rip rap to protect the base of the piers. The great mass of it was waste and fit for no better use; it was not worth taking ashore and dressing for the new piers; on account of the reduced size of the new piers it was necessary to construct them almost entirely without backing and with stones fitted together, so as to make the piers solid masonry, and give them the greatest possible strength, consequently a great deal of stone that was used for the piers under the second plan was unfit for use in constructing the piers under the third plan.

Q. 29. What arrangement, if any, did you have with the Bridge Company about taking down the masonry constructed under the second plan; and about using it, or any part of it, for the piers under the third plan—when and with whom was the arrangement made?

A. I was instructed by Mr. Wilson, the engineer in charge, to make arrangements and procure the necessary machinery, derricks, boats, etc., for taking down the piers to the fifty foot level. These instructions were given shortly after it was determined that the piers under the second plan must come down, and before the final plans were agreed upon; there was no agreement as to compensation. I proceeded to make the necessary preparations and had the piers partly taken down, whereupon Mr. Wilson, the engineer, proposed that I should use such material as was suitable in constructing the piers under the third plan. He charging me at the rate of $6 per perch for limestone, and $3 per perch for sandstone so used; the limestone was to be used in the river piers and the sandstone in the approaches.

Q. 30. State whether the $6 per perch for limestone, and $3 per perch for sandstone included your compensation for taking down the piers; if not, whether any arrangement was made to compensate you for taking down the piers, and if so, what was it?

A. There was no arrangement made to compensate me for taking down the piers, and the prices paid for the stone did not include taking down the piers.

Q. 31. Please state whether there was any saving in using the stone from the second piers for the third piers, at the price you were to pay for it, or whether it would have been cheaper to build the third piers altogether of new stone.

A. If I had to take the stone down from the old piers and pay $6 per perch for it, it would have been cheaper to use new stone; but if I were paid for my labor in taking down the old piers, there would be a saving in using the stone for the new piers.

249 Q. 32. In answer to the 23d question you state that the limestone masonry under the plan finally adopted, was, in your opinion, worth fifteen dollars per perch more than the limestone masonry originally contracted for, and the sandstone masonry two dollars per perch more than that originally contracted for—did you include in this estimate the cost of taking down the piers and masonry constructed under the second plan?

A. I did not.

Q. 33. Did you take into account the stone taken from the piers under the second plan, and the price at which you bought the same?

A. I did.

Q. 34. Can you state what was the cost of tearing down the piers and masonry constructed under the second plan?

A. It is impossible to make an accurate statement. There was no separate account kept showing the cost; parts of the derricks and other machinery constructed and used for taking down this masonry were afterwards used in building the piers under the third plan; then, after the first pier was taken down, such stone as could be used from the other piers was immediately recut and taken to a pier in course of construction according to the third plan, and there used. It was therefore practically impossible to keep the labor account and cost of tearing down separate and distinct from that of rebuilding; but I consider that it was worth to take down those piers at least eight dollars per perch.

Q. 35. State whether you lost any profit by being stopped in the construction of the piers under the second plan and prevented from finishing them up to their full height.

A. They were finished, excepting as I have explained in my testimony heretofore. If I had got extra pay for the work under the second plan, according to the understanding, there would have been some profit upon the construction of the upper part, which was unfinished when the work was suspended by order of the government, but I don't think it would have amounted to much.

Q. 36. Where was the sandstone masonry under the third plan laid?

A. It was laid in the brick arches for coping, askew backs, quoins in the piers, lamp posts, coping for buttress walls, and small piers on both sides of the river for the approaches.

Q. 37. Did you ever negotiate with Mr. Wilson, engineer of the company, with reference to increased compensation to be paid you for work done under the third plan or under the second plan?

A. I never negotiated with him about my increased compensa-
250 tion. He was there simply as a servant of the company. I had frequent conversations with him on the subject, and he always agreed with me that I would be entitled to increased compensation, but I never negotiated with him about it. When the second plan was adopted in the spring of 1869, I wrote him a letter as engineer of the company, dated April 3, 1869, of which he has given a copy in his deposition, but what I intended to do, and what I thought I was doing was through him, to notify the contractor and the company of my position stated in that letter. And then a meeting was held in Cincinnati at which the officers of the bridge company and Mr. Roberts, agent for the contractor, and Mr. Wilson and myself were present, at which meeting it was agreed between myself, Mr. Roberts, and the officers of the company, that I should have such increased compensation as the changes of the work would make proper, as I have heretofore testified in this deposition, and so that it would be equivalent in the matter of profits to the original contract.

Q. 38. State whether it was then agreed that the price per perch named in the original contract should remain unaltered, and what agreement, if any, was made with reference to that.

A. No, sir; it was not agreed that the price should remain unaltered. The very gist of the agreement was that the price should be increased so that the amended work should give me the same profit as I would have made under the original contract; but it was understood that the payments to be made while the work was going on—that is the monthly

estimates and payments should be made upon the price per perch named in the contract, but that I should have the entire estimate without the company's withholding the ten per cent. specified in the contract. And it was further understood that at the completion of the work I should have extra compensation as above stated, and the enhanced price was most assuredly to be by the perch, there is no other satisfactory way of getting at it.

Q. 39. Mr. Wilson, in his testimony, estimates the additional expense of coping upon the piers under the third plan at about fifteen hundred dollars for pedestals, for lamp posts about six hundred dollars, and for askew backs about one thousand and seventy dollars. What have you to say about these estimates, and state, if you please, what were Mr. Wilson's opportunities for judging of these items, and what practical knowledge had he of these matters?

A. I think his estimates are altogether too low, and made without sufficient knowledge of the cost and expense of the work to form a correct idea of their value. In my opinion he has just jumped at it.

251 Mr. Wilson was on the work day by day, saw it in progress, but in my opinion he could have but a very slight idea of its cost. I think his practical knowledge in the matter of stone cutting, and the expense of doing the same, was very slight.

Q. 40. In the estimate which you have given in your testimony of increased compensation to which you are entitled for masonry work as finally completed—that is, under the third plan—did you include the additional coping, pedestals for lamp-posts, and askew backs, referred to by Mr. Wilson, and in your answer last above?

A. Yes, sir.

Q. 41. Mr. Wilson, in his testimony, states that the cost per perch of face work of the smaller piers would not be increased, but the relative quantity of it would be increased. State whether there is any other element of increased cost in the smaller pier, and, if so, what is it?

A. Mr. Wilson was then testifying with reference to the piers under the second plan, which were very different from those constructed under the third plan. Take, for instance, piers 5 and 7. Twenty-three feet of the heighth of those piers were taken down, and then, under the third plan, the same piers were built up forty feet four inches, that is to say, the heighth was increased seventeen feet four inches. These piers were of the same dimensions, that is to say, ten feet three inches in thickness and twenty-five feet seven inches in length, under both plans, at the point where the rebuilding was commenced, but the batter was so changed that the pier under the third plan was twenty-three feet six inches long and eight feet wide at the top, under the coping, which were the top dimensions of the same piers under the second plan. At the point where the rebuilding was commenced these piers were, under both plans, as I have stated, ten feet three inches thick; but under the second plan, which was twenty-three feet lower, it was not necessary to build them almost entirely of solid limestone masonry, as it was under the third plan. Under the second plan some backing of sandstone could be and was used.

The following statement will show more clearly the effect of the changes of plan upon the masonry of these piers. Had these piers been built according to the original plan that I bid upon, each would have contained eight hundred and ten perches of limestone and twenty-eight hundred and eleven perches of freestone, making a total of thirty-six hundred and twenty-one perches of masonry. Under the second plan, pier No. 5 contained of limestone seven hundred and seventy-

eight perches, and of freestone four hundred and forty-two perches, making a total of twelve hundred and twenty perches; and No. 7 contained of limestone five hundred and sixty-five perches, and of
252 freestone six hundred and fifty-five perches—total, twelve hundred and twenty perches, and total for both piers, twenty-four and forty perches. Under the third plan the rebuilt portion of No. 5 contained of limestone four hundred and ten perches and freestone four perches—total, four hundred and fourteen perches; and No. 7 contains three hundred and fifty-five perches of limestone and no freestone. Thus it will be seen that the piers, as finally constructed, were not only solid limestone masonry, but the stone had to be carefully bedded and jointed, and it was also necessary, in order to give the required strength to the piers, to break joints, as in brickwork, which added greatly to the labor and expense.

Q. 42. State whether any allowances were made to you by Mr. Wilson, or by the bridge company, or by any other person on its behalf, for extra compensation for work done under the third plan, and in pursuance of any arrangement or agreement to which you were a party.

A. No allowances or payments were made to me at any time by Mr. Wilson or the company, or anybody for them, in pursuance of any agreement or arrangement made by me for settlement of my claim for extra compensation, excepting by the compromise of the case of George A. Smith & Co., against the bridge company, in the court of common pleas of Hamilton county. Mr. Wilson did allow for coping askew-backs, brick masonry, and lamp pedestals the sums which he states in his testimony, but I did not accept the allowances as a full settlement. All the payments that were made to me, and all the allowances, were upon account only, and so credited by me.

Q. 43. Look at the copy of the receipt or voucher No. 128, attached to Mr. Wilson's deposition, and signed by you. State whether it is a correct copy, and what explanation, if any, you have to make of your receipt for five thousand two hundred dollars, in full of the above account?

A. I presume that it is a correct copy. I hesitated about signing that receipt "in full of the above account," but my counsel advised me that it would have no bearing upon my charges for extra compensation. As I before testified, I was to be paid as the work progressed by estimates according to the original contract price, excepting that the ten per cent. was not to be retained. They did, however, retain the ten per cent., whereupon I refused to go on with the work, and they did advance me on account of the ten per cent. eighteen thousand one hundred dollars, and I signed the vouchers. But that was simply carrying out the arrangement that I should be paid as the work progressed by estimates
253 according to the original contract prices, reserving for after adjustment the matter of extra compensation as arranged for. The enhanced cost of the work under the third plan took up all the money that was paid to me, and compelled me to draw heavily upon my private capital and borrow from my friends, so that I could not get on with the work without having at least an allowance from the ten per cent., which they were retaining contrary to the understanding, and I several times notified them, through Mr. Wilson, and made personal appeals to Mr. Roberts when he was here, that if they did not pay me the ten per cent. it would be equivalent to compelling me to stop work. Upon these representations they made allowances and payments amounting to eighteen thousand one hundred dollars.

At this point adjourned the further taking of depositions to December —, 1876.

CHAS. C. DAVIS, *Notary.*

Q. 44. State how many perches of limestone, how many of sandstone masonry, and how many of brick-work are in the work done under the third plan, what was its value, and how much of this value is for extra compensation?

A. The amount of limestone masonry was two thousand three hundred and five and $\frac{15}{100}$ perches; the amount of sandstone masonry was four thousand eight hundred and ninety seven and $\frac{94}{100}$ perches, and the amount of brick masonry was three thousand three hundred and ninety-five and $\frac{63}{100}$ perches. The value of the limestone masonry was thirty-five dollars per perch, or in the aggregate $70,681.30; of this, $15.00 per perch, or $34,577.70, is for extra compensation; the value of the sandstone masonry was twenty dollars per perch, or in the aggregate $97,958.80, of which $2.00 per perch, amounting to $9,795.88, is for extra compensation; the value of the brick masonry was $13.25 per perch, or in the aggregate $44,992.09, of which $5.00 per perch, amounting to $17,008.15, is for extra compensation.

Q. 45. What was the value of the work done in taking down the piers constructed under the second plan?

A. That was worth eight dollars per perch; the first pier was taken down to the foundation; number of perches taken down, $956\frac{16}{100}$; piers numbered two (2), three (3), four (4), and five (5), were taken down to the string courses; the number of perches taken down from pier two was $225\frac{77}{100}$; from pier three, $22\frac{74}{100}$; from pier four (4), $22\frac{84}{100}$, and from pier five, $113\frac{75}{100}$; pier 6 was taken down entirely, $2,488\frac{14}{100}$ perches; pier 7 was taken down to the string courses; number of perches taken down, $185\frac{76}{100}$; total number of perches taken down, $4,014\frac{95}{100}$, and the value of the work $32,117.20; only the coping was taken off from pier 8, and nothing from pier 9.

254 Q. 46. What disposition was made of the case brought by you against the bridge company in the court of common pleas of Hamilton County?

A. My attorneys moved for judgment against the company for the amount of my claim not put in issue by the answer, being $50,782.47, with interest, leaving the action to proceed for the residue; the motion was granted, and that led to negotiations which resulted in the company paying me $95,000.00, I agreeing to look for the residue of my claim to the result of this cause; the agreement of compromise is in writing, and I attach a copy of it to my deposition, marked Exhibit E.

Q. 47. To what plans and specifications did your letter of April 29th, 1869, addressed to George B. Roberts, esq., agent, containing a proposal to build the brick work in the approaches, and copied into and made part of Wilson's last deposition, refer?

A. That letter referred to the brick work in the approaches under the second plan—the low bridge. The third plan was not adopted until 1871, nearly two years afterwards, and the brick work was different and more expensive, as I have already explained.

Q. 48. Please state in the form of an account, with all proper credits thereon, the amounts due you from the bridge company exclusively for increased compensation by reason of the changes required in the bridge by act of Congress?

A. *The Newport and Cincinnati Bridge Company to George A. Smith, Dr.*

To increased compensation for two thousand three hundred and five $\frac{15}{100}$ perches limestone masonry furnished and laid in construction of piers according to third plan, @ $15 per perch	$34,577 70
To increased compensation for four thousand eight hundred and ninety-seven $\frac{97}{100}$ perches sandstone masonry, furnished and laid in piers and approaches constructed according to third plan, @ $2 per perch	9,795 88
To increased compensation for three thousand three hundred and ninety-five $\frac{95}{100}$ perches brick masonry, furnished and laid in approaches constructed according to third plan, @ $5 per perch	17,008 15
To values of work and labor taking down four thousand and fourteen perches of masonry, piers constructed according to second plan, @ $8 per perch	33,117 20
Total	$93,498 93

255 There are no credits to be applied to this account, excepting as appears by the contract of settlement made by me with the bridge company, a copy of which is attached to my deposition marked Exhibit E—that is to say, from this amount, if recovered, the bridge company is to retain $44,217.53, and the residue being $49,281.40 is to be paid to me.

Cross-examination by WARNER M. BATEMAN, Esq.:

X Q. 1. State when you were first advised of the height of the bridge to be erected under the original plan.

A. About one month previous to the date of my contract, which was the 9th of October, 1868.

X Q. 2. From whom did you receive you information, and how, as to the height of the bridge?

A. I received my information from plans or sketches shown by Mr. Wilson at the engineer's office at the Little Miami Railroad Company's depot—Mr. John C. Wilson, the engineer in charge of construction of the bridge company. The plans had upon them a statement of the height of the bridge, one hundred feet for channel spans, and upon that understanding I made my calculation and bid.

X Q. 3. Was the height of the bridge at the time of your bid a material consideration, governing the terms of your bid; and, if so, how?

A. It was; the higher the bridge, the larger the piers with the same batter. The batter fixed on in the contract was a half an inch to the foot; as you increased the height of the bridge, therefore, and with it the size of the piers, you increased the amount of backing stone in proportion to the amount of the face stone; the profit being in the backing stone, and not in the facing.

X Q. 4. In the original plan upon which you bid, was there any pivot-pier contemplated?

A. No, sir.

X Q. 5. Was it not the understanding at the time of your bidding, among those interested in the bridge, that the bridge was to be a bridge of a hundred feet in height?

A. It was mine, certainly, and it was the understanding of all officers and agents of the company with whom I conversed.

X Q. 6. Were there any drawings or detailed directions given you

after your contract, as to the construction of the piers; and did those drawings and directions, if any, contemplate a hundred-feet bridge?

A. There were a number of working drawings for different piers
256 for the purpose of getting out stone, all of which were drawn for a hundred-foot bridge, according to my understanding—while some of the stone would answer for either height of the pier, others would not, and, after a change of plan, had to be recut.

X Q. 7. When did you begin quarrying and preparing stone for the bridge?

A. The day after my contract was signed, at North Vernon, Indiana, and shortly after that, at Portsmouth, Ohio.

X Q. 8. When were you first advised of a change of plan to a seventy-two feet bridge?

A. About April 1st, 1869; Mr. Wilson, engineer of the bridge, told me of it, and showed me plans of masonry very much reduced in size and height and quantities, in which brick had been substituted for stone in some parts, and a general change in the plans, and a round pier provided for.

X Q. 9. What answer did you receive or what action was taken by the company upon your letter of April 3d, 1869, Exhibit B, to your answer in chief?

A. I received no answer to the letter, but was invited to a meeting of the directors at the Burnet House shortly afterwards.

X Q. 10. At that meeting was not the change of plan from a hundred-feet to a seventy-two-feet bridge admitted by the officers of the company, and was not your claim discussed upon the basis of such admitted change?

A. It was. And they agreed at that meeting to pay me an increased price per perch for masonry to be laid in the new plan of bridge, but inasmuch as the plans of the change had not been fully prepared, the amount of such increase was referred to J. Edgar Thomson to be determined thereafter, it being agreed that the price should be so fixed as to make the work as altered as profitable as it would have been under the original plan.

X Q. 11. What would the masonry of the bridge have cost under the original plan of 1868? What would it have cost under the plan adopted in April, 1869?

Here adjourned till Thursday, March 22, 1877, 9.30 a. m.

CHAS. C. DAVIS, *Notary.*

Met pursuant to adjournment, same parties present.

A. I could not state what would have been the cost of the bridge upon the plan originally designed, nor can I state what would have been its cost upon the plan adopted in 1869 upon which the bridge was being constructed when the act of Congress was passed which required its change.

X Q. 12. With what person did you make the agreement as to the compensation to be received upon the change of plan in April, 1869?

257 A. There never was anything but a general verbal understanding with J. C. Wilson, the engineer in charge. I derived my understanding altogether from the meeting at the Burnet House already referred to.

X Q. 13. What connection had the persons meeting there with the bridge company? Was it a meeting of the officers of the bridge company; and, if so, what ones?

A. I don't know whether it was a meeting of the officers of the bridge

company or not, but there was a number of officers there: Alfred Gaither, president; J. H. Linville, chief engineer; Wm. H. Clement, director; Mr. Thomas Scott was present, but whether in an official capacity I do not know; J. Edgar Thomson, president of the Pennsylvania Railroad; Mr. J. C. Wilson, the engineer in charge.

X Q. 14. Was there any memorandum in writing, or entry or other record made of this conversation or understanding?

A. Not to my knowledge.

X Q. 15. Had you any subsequent conversations or transactions with the company, defining more particularly your agreement than you have stated?

A. On April 29th, 1869, I made a proposition for the brick-work under the second plan, which was formally accepted, as I was notified by Mr. Wilson. I had other promises from Woodward that the company should deal liberally and fair with me, and that I should have increased pay for all extraordinary and expensive work that was more expensive and less profitable than the work of my contract. This conversation with Woodward referred to my night work and Sunday work. George B. Roberts also said that I need have no apprehensions about being fully paid for all extra work I might do. This was in the midst of the Sunday and night work; I had so many complaints that I do not know what particular part of the work he referred to. I don't now recall any conversation with other parties.

X Q. 16. Will you please state the manner in which you arrived at the sum paid to you by the bridge company under your contract of settlement of June 19, 1873, being Exhibit E to your answers in chief.

A. It was the result of a compromise, in which I sought to get as much as I could of my claim.

Adjourned till 9.30 a. m., March 22, 1877.

CHAS. A. DAVIS, *Notary.*

Met pursuant to adjournment, and resumed the taking of deposition, same parties present.

X Q. 17. Are not the foundations below the surface of the ground more profitable than the pier above the surface?

258 A. Generally, yes.

X Q. 18. So that an increase in the size of the foundations would not, upon the same rate of compensation, affect injuriously the profits of the contract to you?

A. No, sir.

X Q. 19. Was there no brickwork contemplated in the original plan?

A. No, sir.

X Q. 20. Was there any difference in the rates of compensation to be allowed to you for the brickwork between the second and third plans; if so, what?

A. Yes, sir; after the work was completed, it was to be a matter to be adjusted between myself and the engineer in charge, and if we could not agree, it was to be referred to Mr. Thomson. This agreement as to settlement or compensation was made in reference to all the work, including both brick and stone. This agreement was made on the occasion of the first change of plan, and is the same I have heretofore explained. All subsequent work done under the second and third plans were done under that agreement as to the settlement of compensation.

X Q. 21. Did the claim which you made, and as set up in the original bill herein against the bridge company, include any additional charge

for brickwork over and above the rate fixed in your proposition of the 27th of April, 1869; and, if so, state particularly what that was?

A. Yes, sir; it did. I answer generally that there was 2,269 $\frac{85}{100}$ perches, for which I claimed compensation of $8.25 per perch, according to the terms of my proposition of April 27, 1869, making an aggregate of $18,722.04, which amount the bridge company agreed to pay. The amount of brick masonry done under the third plan was 3,395 $\frac{63}{100}$ perches, for which I claimed compensation at the rate of $13.25 per perch, making an aggregate of 44,992.09. This claim is included in the amount which is set out in the original bill herein.

X Q. 22. Is the amount of brickwork last stated an accurate statement of the amount of brickwork done in addition to the amount first stated in your answer, and do these two amounts represent the aggregate of brick masonry in the bridge as completed?

A. I believe it is; these amounts were those furnished by the bridge engineer.

X Q. 23. What proportion of the brick masonry upon the Cincinnati side of the river was torn down, and what was the amount thereof so torn down?

A. The whole of it was torn down; I cannot state precisely the number of perches.

259 X Q. 24. What was done with the brick, and if used, what allowance was made by you for them?

A. A comparatively small portion of the brick was used in masonry under the third plan; being laid in cement, they were hard to clean and fit for use; I was only required to furnish the cement, sand, centers, and labor in putting them up; the company furnished the brick, paying me for the measures in the wall.

X Q. 25. Have you been paid for the work torn down; if so, how much; have you any accounts of such payments?

A. I have been paid for the work torn down at the original rate agreed on; I cannot tell the amount of the work that was torn down; the brickwork on the Kentucky side of the river was only altered in part; very little of it was torn down.

X Q. 26. State whether the difference between the rate originally agreed on, $8.25 per perch, and the rate you claim, $13.25 per perch, upon the work done under the third plan, is all that remains unpaid of your claim upon the brickwork.

A. Yes, sir.

X Q. 27. State whether the amount you claim for work done under the second plan, or the first change, for work done in stone masonry, being $485,928.60, was according to the rates of your contract of October 9th, 1868; and if not, was it agreed to by the company?

A. No, sir; it was not according to the October contract, nor did the company assent to it.

X Q. 28. Did they pay you for the amount of the work, as stated in your deposition, done under the first change of stone masonry, according to the rates of the October agreement?

A. Yes, sir.

X Q. 29. Have they paid you for all the masonry, brick and stone, done by you under the second change, the stone according to the October contract, and the brick according to the rate of your proposition of April, 1869?

A. They have.

X Q. 30. The company, in their answer in your case against them in the court of common pleas, that you have referred to, admitted that

there was due to you the sum of $50,782.47; was this amount included in the $95,000 paid to you on the settlement of June 19th, 1873; and did it satisfy the account for all your work of brick and stone masonry according to the rates of the contract of October, 1868, and April, 1869?

A. The sum named was included in the $95,000 received by me in the settlement above referred to; a portion of the $50,000 was needed
260 to complete the payment for brick or stone masonry, according to the rates of the contracts referred to.

X Q. 31. What extra compensation did you claim in addition to the increase in the rate for brick and stone work stipulated for in the October and April contracts?

Here adjourned till 2 p. m.

CHARLES C. DAVIS,
Notary Public.

Met pursuant to adjournment and resumed deposition.

A. I made no claim beyond an increase of the rates per perch for the brick and stone work.

X Q. 32. By what means did you reach the amount of such increase of rate, and what damage, additional work, or inconvenience did it include.

A. My understanding was that for the work done under the second contract I was to be made whole; that is, I was to have the same profit per perch as I could have made per perch under the original contract. In addition to that, I was to have such sum as would be equal to the profits I would have made upon the number of perches that would have been laid under the original plan over and above the number laid under the first change of plan. In reaching the amount of compensation for work under the third plan, I took the original contract price as the basis, and added to that a sufficient sum to compensate for the additional labor and expense under all the circumstances existing of performing the work, over and above what it would have been, to have performed the same amount of work if there had been no change of plan.

X Q. 33. State what you estimated at the first change would have been the profit per perch under the original contract.

A. In my opinion there would have been a loss of from one to two dollars per perch on the limestone masonry and a profit of from ten to eleven dollars per perch on the sandstone masonry.

X Q. 34. At the time you made the proposition as to the price for the brick-work, why did you not also endeavor to fix the price of the stone work?

A. At that time there were no plans made showing the amount of changes, and I could form no idea to what extent the original plans would be changed, and I felt satisfied that the company would carry out honestly the arrangement made at the Burnet House meeting.

X A. 35. In determining the price of rebuilding the portion of pier torn down, what, if any, charge or allowance was made on account of the labor of taking down and for the use of the materials removed
261 A. I did not take into consideration, in making my price for rebuilding, the expense of taking down the piers, but I did value the material that I used in rebuilding the piers under the last plan, and gave credit and paid for it to the bridge company.

X Q. 36. Please state what the amount of allowance was for the stone removed, and in what way it was accounted for.

A. I cannot state the quantity of old material used in rebuildin

piers under the third plan; the amount used was charged against me and deducted from my monthly estimates by the engineer in charge.

X Q. 37. Was there any contract between you and the company as to the rate of compensation you should receive for tearing down the piers; and, if so, what?

A. There was none.

X Q. 38. Did the charge contained in the answer to question 48 in chief, for the work of tearing down, include any piers not rebuilt; and, if so, what are they?

A. I think not.

X Q. 39. Will you please specify the piers and parts of piers, and the amounts in perches in each, included in the charge for tearing down?

A. That is stated specifically in answer to question 53 and 54 in chief.

X Q. 40. Please state whether or not the pivot-pier is not included in the amount of your charge.

A. It is. It includes $2,488\frac{11}{100}$ perches of stone included in that pier.

X Q. 41. During the progress of this work of tearing down, before it began, or after it was completed, was there any negotiation or agreement between you and the company with reference to the compensation to be paid you for the work; if so, what and with whom?

A. Nothing more than the general understanding before referred to.

X Q. 42. By whom were the hands employed and paid in the work of tearing down; and have you any account of the amount of expenses by you incurred in doing the work? If so, please furnish it.

A. All men employed in tearing down were employed and paid by me on monthly pay rolls. I cannot state the amount expended in tearing down, as there was no separate account kept. Men employed in tearing down to-day would perhaps be rebuilding to-morrow. Engines and boats in use one day would be perhaps used in tearing down another.

X Q. 43. State whether during the progress of the work, or since, you presented to the company any account for the service performed by you in the work of tearing down.

A. No, sir; I have not.

X Q. 44. Have you ever attempted to ascertain the amount of your expenses incurred in tearing down?

A. No, sir; I have not.

X Q. 45. By what means have you fixed, as a fair charge, the amount of eight dollars per perch for the work of tearing down?

A. From my experience in the work of building piers and the great difficulties under which those piers were taken down. It is my opinion that the price charged was a low price for the amount of work and the circumstances in which it was done.

X Q. 46. Could not a fair price have been reached with certainty by keeping a separate account of the expenses incurred in performing the work; and would it not have been the fair way to have avoided controversy to have done so?

A. In my opinion it would have been impossible to have done the work economically if the same men, boats, engines, derrick boat, etc., had been kept at work solely for the purpose of tearing down, as there were often times delays of several days in unloading boats and putting on rigging on different piers, where men would necessarily have had to have been idle and unoccupied.

X Q. 47. Please state the occasion for the night work and the Sun-

day work, for which an extra charge and allowance has been made, and the period when such work was performed.

A. The reason given me was the anxiety to have the work completed as soon as possible before cold weather set in, when we would necessarily have to stop work.

Here adjourned till 9.30 a. m., March 23d, 1877.

CHAS. C. DAVIS, *Notary.*

Met pursuant to adjournment, and resumed deposition, same parties present.

The night and Sunday work was done during the summer and fall of 1871.

X Q. 48. Was it not in the latter part of summer, and did it not extend into the winter?

A. I think it commenced about June, and extended up into the latter part of December, until we were stopped by frost; we worked as long as the frost would permit us.

X Q. 49. Was there not also an increase in the force of the hands in the latter part of the year.

A. After the latter part of October we discharged a large amount of our force on account of having finished our approaches; and having no work to do except to finish up the piers, that part of the work was pushed ahead as rapidly as possible.

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X Q. 50. And in meantime was there not, during the fall, much discussion in the newspapers, and remonstrances or opposition among the merchants and boating interests in Cincinnati, to the construction of the low bridge on the company's plan?

A. I remember of having seen articles in the daily papers on the subject, and having heard discussions for and against a low bridge and its effect upon the navigation of the river; but at what time of the year I cannot say.

X Q. 51. And was not that a topic of conversation in some degree between you and the agents or officers of the company during the same time?

A. It is more than likely that I have had numerous conversations with Mr. J. C. Wilson, engineer in charge, on that subject, but I cannot recall to mind any one time when that matter was discussed.

X Q. 52. You say in your answer to the 23d question that you considered the limestone masonry as made was worth fifteen dollars per perch more than that contracted for originally, and in another answer on cross-examination you have stated that there would have been a loss of about two dollars per perch on the limestone masonry of the original contract. Did the addition of the fifteen dollars make up, or was it intended to make up, not merely the increased expense of the work, but also this estimated loss?

A. It was intended to make up no losses on former work; the price fixed was, in my estimation, a fair price for the work as done under the last plan.

X Q. 53. What amount of profit per perch did you estimate would accrue to you under the price so fixed?

A. About fifteen per cent.

X Q. 54. Why did you not stipulate in your receipts, either that the payments should be taken upon your account generally, or be taken without prejudice to your claim for an equitable extra allowance; why did you give a receipt in full for the amount due?

A. I gave receipts as demanded of me by the company, understand-

ing from my attorneys it would not prejudice my claim for extra compensation, and that this was merely a receipt on account.

EXHIBIT A.

264 Plaintiffs were required to, and did proceed to, reconstruct said piers, by tearing down pier No. 1 to its foundation, and rebuilding it seventy-five feet high and twenty-five feet in length by six feet in thickness below the coping stone, with a batter of three feet in the length and two feet eleven inches in the thickness thereof. That pier No. 2 was taken down by plaintiffs to the ice-breaker line, which is forty-two feet above the foundation, and built up to the height of ninety-five feet two inches above the timber-grillage, and twenty-five feet six inches in length by seven feet ten inches in thickness below the coping stone, with a batter of a quarter of an inch to the foot. That piers numbered 3 and 4 were also taken down by plaintiffs to the string-course, which is fifty-two feet and four inches above the timber-grillage, which is the foundation of said piers, and rebuilt to the height of one hundred and two feet and four inches in length by ten feet in thickness under the coping stone, and with a batter of one foot and nine inches in the length and one foot nine inches in the thickness, reckoning from the string-course to the top of the pier. That piers numbered 5 and 6 were taken down by the plaintiffs twenty-three feet, to the string-courses, and rebuilt to the height of forty feet and four inches above the string-courses, and twenty-three feet six inches in length and eight feet in thickness under the coping, with a batter, reckoning from the string course, of two feet four inches in the length and of two feet three inches in the thickness of the piers.

That pier No. 7 was by the plaintiffs taken down twenty-two feet six inches to the string course, and rebuilt to the height of thirty-six feet and three inches above the string-course, and twenty-three feet six inches in length and seven feet in thickness under the coping stone, with a batter of one inch in the length and two feet six inches in the thickness of the pier, reckoning from the string course. That pier No. 8 was by the plaintiffs raised in height ten feet three inches, and made seventeen feet four inches in length and six feet six inches in thickness, plumb work, in iron corner-casings, to the coping. That plaintiffs built upon the coping of said pier five feet two inches in height, seventeen feet four inches in length, and six feet six inches in thickness, plumb work, within iron casings.

Plaintiffs further state that piers numbered 6, 7, and 8 had been by them completed under the second plan aforesaid, and the iron superstructure placed thereon; that when they were rebuilt as aforesaid, according to the third and last plan aforesaid, it became necessary to raise said superstructure, and the same was raised by hydraulic jacks and the work of rebuilding said piers was done under said superstructure, whereby the expense and danger of said work was greatly enhanced, and the work itself greatly protracted.

265 EXHIBIT B.

Plaintiffs state that they commenced work under said contract about the tenth day of October, A. D. 1868, and that shortly afterward, to wit, about the first day of March, A. D. 1869, the entire plan was by said defendant changed, so as to provide for channel piers seventy two feet high above low-water mark in the Ohio River, and a round pier for

a draw. That the piers, other than the channel piers, were reduced correspondingly in height, and all the piers were reduced in length and in thickness. That the plan of pier number one, being the first pier upon the Ohio shore, was so changed as to be built at the foundation fifty-one feet six inches in length, being the same length as in the original plan, and twelve feet thick, whereas the original plan was for twenty-one feet thickness; that it was by said change of plan to be built up thirty-two feet, to the string-course, where it was to be forty-three feet ten inches in length and six feet six inches thick; there it was to be set in to twenty-five feet nine inches in length by five feet nine inches thick and built up to coping stone, fifty-four feet above the top of the foundation. That pier number two was to be commenc*ed* at the foundation at the same length as in the original plan, being sixty-six feet by fifteen feet ten inches in thickness; that it was to be built up eight feet seven inches, where it was to be sixty-four feet in length by thirteen feet ten inches thick, where it was to be set in to fifty-two feet in length by thirteen feet ten inches in thickness, then built up forty-two feet, to the string-course, with regular batter, so that at the string course it should be thirty-four feet six inches in length by nine feet eight inches in thickness, then set in to twenty-seven feet four inches in length by nine feet eight inches in thickness, and up twenty-two feet six inches, with dimensions twenty feet six inches in length by eight feet in thickness under the coping stone. That piers three and four were to be, at the top of the foundation, fifty-six feet nine inches in length by fifteen feet six inches in thickness, to be carried up fifty-two feet four inches to string-course, with regular batter, and at the string-course they were to be thirty-six feet in length by eleven feet nine inches in thickness. That they were there to be drawn in to twenty-seven feet and three inches in length by eleven feet nine inches in thickness, and built up twenty-three feet to the top of the coping, and that they were to be twenty-five feet six inches in length by ten feet in thickness under the coping. That piers numbered five and six were to be, at the top of the foundation, fifty-three feet in length by fourteen in thickness, and built up forty-four feet three inches to the top of the string-course,
266 where they were to be thirty eight feet in length by ten feet three inches in thickness. That they were to be there set in to twenty-five feet seven inches in length by ten feet three inches in thickness, and built up twenty-three feet to top of the coping, and twenty-three feet six inches in length by eight feet in thickness under the coping stone. That pier number seven was to be forty seven feet and seven inches in length by twelve feet and ten inches in thickness, thence to be built up thirty-eight feet to the top of the string-course, where it was to be thirty-five feet long and nine feet six inches thick. There it was to be set in to twenty-three feet seven inches in length by nine feet six inches in thickness, and built up twenty-three feet in height to the top of the coping stone, and that it was to be under the coping twenty-three feet six inches in length by eight feet in thickness. That pier number eight was to be twenty-five feet three inches in length by ten feet nine inches in thickness at the bottom, and built up fourteen feet to the string or level course, where it was to be set in to the length of twenty-three feet and to the thickness of nine feet eight inches, and built up twenty-three feet to the top of the coping, and to be twenty-one feet six inches in length and eight feet in thickness under the opening.

EXHIBIT C.

This agreement, made and concluded this 9th day of October, 1868, between G. C. Franciscus, of the city of Philadelphia, State of Pennsylvania, of the first part, and George A. Smith & Co., of the city of Cincinnati, State of Ohio, of the second part, witnesseth:

That the said parties of the second part agree to furnish all the materials and construct the masonry of the Newport and Cincinnati bridge, at such point across the Ohio River as may be designated by the engineer of the bridge company, J. H. Linville, or his successor in office, according to the specifications hereto attached, marked A, and to do the work within a reasonable time, and in a workmanlike manner, subject to the inspection and approval of said J. H. Linville, esq., chief engineer, or his successor, as aforesaid.

And the parties hereto further agree that all matters of difference arising between them in relation to said work shall be referred to said chief engineer, or his successor, and that his decision and award shall be final and conclusive.

The said party of the first part, in consideration of the foregoing, agrees to furnish yard room for stone at the bridge site, and to pay said party of the second part as follows: For work done and material furnished—limestone masonry, ($20) per perch of twenty-five (25) cubic feet; sandstone masonry, ($18) eighteen dollars per perch of twenty-five cubic feet, as aforesaid.

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Foundations at cost of labor, materials, and superintendence.

Said party of the first part further agrees to pay said party of the second part, in monthly estimates, to be made by the chief engineer or his assistant, for work done, material delivered at bridge site, and got out in quarry, at the relative value thereof, retaining 10 per cent. until the final completion of the work, and upon the full and faithful completion thereof to pay in full at rates heretofore specified.

It is mutually agreed and understood that no percentage is to be retained on account of work and material used in foundations.

GEO. A. SMITH & CO.
G. C. FRANCISCUS.

In presence of—
ALFRED GAITHER,
W. S. COTTRINGER.

Specifications for masonry, Newport and Cincinnati bridge.

The piers in the channel of the river will be founded on the rock, if bottom can be reached at reasonable depth; otherwise on a hewn timber grillage, or on piles below the level of low water. In foundations above low water, the piers will be founded on a bed of concrete, two (2) feet in thickness. The depth to which the foundations of the piers must be sunk, and the character and fitness of the foundations, will be determined by the engineer in charge of the works.

The masonry must be rock-ranged work. The stones must be accurately squared, jointed, and bedded, and laid in courses of not less than twelve (12) inches thick, nor exceeding thirty (30) inches in thickness, regularly decreasing from bottom to top of pier. All face stones are to have a bed equal to once and half the perpendicular face or rise.

Stretchers shall not be less than five (5) feet in length; headers shall be long stone not less than five (5) feet in length, and shall hold the size in the heart of the wall that they show in the face, and must be so ar-

ranged as to occupy from one-sixth to one-fifth of the entire face, and be similarly disposed in the back of thick walls.

When the thickness of the wall will admit of their interlocking, they must be disposed in that manner.

268 In thicker walls, stones not less than four (4) feet in length will be placed transversely in the heart of the wall, to connect the opposite sides or bond the backing.

The stones used for backing must be well-shaped, large stones, of the same thickness usually as the face stones. They must be bedded solidly, without spawls or underpinning, and scabbled off to secure a good bond with the headers. All interstices between the backing to be filled with chips and loose stones before grouting.

The face stone will be pitched to line at the joints, the face being left rough as they came from the quarry, unless the projections above the line exceed three (3) inches, in which case they shall be roughly scabbled off to their limit. Each course shall be laid in mortar composed of one part fresh hydraulic cement, of approved quality, to two parts sharp river sand, and after the backing of each course has been leveled off and filled up, it shall be thoroughly grouted with hydraulic mortar in the above proportions.

The face stone of the two (2) channel piers and two piers contiguous to the same shall be limestone, of quality to be approved by the engineer. The backing may be sound, strong sandstone.

The other piers and retaining walls of approaches may be built of sound, durable sandstone or freestone that will resist the action of frost and the weather. Limestone facing to be used in all portions of piers and abutments exposed to ice flow.

All the piers will be coped with dressed stone of thickness not less than eighteen (18) inches on river piers, and twelve (12) inches on land piers. The cutwaters of river piers shall be dressed, and fastened together with iron clamps or dowels at the usual level of ice floods, and four (4) feet above and below that level; coping will also be clamped together with iron clamps.

Proposals for masonry may include all the foundations, masonry of piers and retaining walls, and all expense of preparing and sinking foundations.

Proposals may also be made for the masonry, exclusive of the foundations, and sinking or preparing the same.

(Signed) J. H. LINVILLE,
Chief Engineer.

269 EXHIBIT D.

CINCINNATI, *April* 3, 1869.

J. C. WILSON, Esq.,
Engineer Newport and Cincinnati Bridge Co.:

DEAR SIR: After examining the new plans for the masonry of the Newport and Cincinnati bridge, shown me this day, I wish to inform you that I cannot afford to do the work without an increase of compensation over that named in my contract. In the plans upon which I bid there was a much larger amount of masonry in both the river piers and the approaches, and no brick-work.

Brick-work has now to a large extent been substituted for stone, the stone-work greatly reduced in quantity, and the cutting increased and elaborated, thereby much increasing the cost. The great reduction in the amount, and change in the character of the work in the approaches,

is particularly hard on me, as on this portion of the work I had expected to make my profits; the river work even, on the original plan, affording no margin at the price at which it was taken.

(Signed) GEORGE A. SMITH.

EXHIBIT E.

This agreement, entered into this nineteenth day of June, 1873, between Geo. A. Smith & Co., party of the first part, and the Newport and Cincinnati Bridge Company, party of the second part, witnesses:

That whereas on the 29th day of May, 1872, the said George A. Smith & Co. filed their petition in the court of common pleas for the county of Hamilton and State of Ohio, against the said Newport and Cincinnati Bridge Company and others, wherein they claimed a judgment against said bridge company for the sum of two hundred and fifty-seven thousand four hundred and forty-one $\frac{09}{100}$ ($257,441.09) dollars, with interest thereon from March 19, 1872, being the amount alleged by the said George A. Smith & Co. therein, to be due to them from said bridge company as the balance of their account for materials furnished and labor performed by them in the construction of the masonry in the bridge of said bridge company, extending from Newport, in the State of Kentucky, to Cincinnati, in the State of Ohio:

270 And whereas the said The Newport and Cincinnati Bridge Company, on the 14th day of January, 1873, filed its answer to said petition, in which it is stated that said bridge company had paid to said Geo. A. Smith & Co. on account of materials furnished and labor performed by them in the construction of the masonry in said bridge, the sum of four hundred and seventy-five thousand two hundred dollars, which payments it is hereby admitted have been made as therein stated;

And whereas the said Newport and Cincinnati Bridge Company have agreed to pay to said Geo. A. Smith & Co. on the same account, the further sum of ninety-five thousand dollars;

And whereas on the eighth day of March, 1873, the said Newport and Cincinnati Bridge Company filed its bill in equity in the circuit court of the United States for the southern district of Ohio, against the United States of America, under the authority of and in pursuance of the provisions of the fifth section of an act of Congress entitled "An act making appropriations for the service of the Post-Office Department for the year ending June 30, 1872, and for other purposes," approved March 3, 1871, for the purpose of recovering a decree against the United States for the amount of the actual and necessary cost and expenditures reasonably required to be incurred in making the changes in the said bridge and its approaches as authorized or required by said act, in excess of the cost of building said bridge and approaches, according to the plan proposed before the changes required by said act to be made; and in said bill it is set out and alleged by the said bridge company that the actual necessary and reasonable cost of making the said additions and alterations amounted to the sum of three hundred and one thousand eight hundred and seventeen dollars, and the further sum of forty-eight thousand nine hundred and seventy-four $\frac{25}{100}$ dollars, as the increased cost of said work by reason of the delay in the completion of said bridge, unavoidably occasioned by the necessity of making said changes; and also in said bill it is stated and alleged that the said G. A. Smith & Co., contractors for the masonry in said bridge, allege that by reason of the changes required in the said plan, the pay-

ments to them having been made upon the contract prices fixed by the contract already entered into previous thereto, they had been damaged in the sum of two hundred and six thousand six hundred and fifty-eight $\frac{53}{100}$ dollars; the said contract, as they aver, having been broken by the said bridge company by requiring the work under the same to be performed according to said altered plan, as required by said act of
271 Congress, said sum being the balance sued for by said G. A. Smith & Co. in said action, commenced by them as aforesaid, less the sum of fifty thousand seven hundred and eighty-two $\frac{47}{100}$ dollars, admitted in the answer of said bridge company to be due from it to said G. A. Smith & Co., according to the terms of said contract, and which sum the said bridge company, in the statement of its claim against the United States in said bill in equity, treated as having been paid by it to said G. A. Smith & Co.;

And whereas it has been agreed between the parties hereto, that whatever the said bridge company is entitled to recover from the United States, on account of said claim of said G. A. Smith & Co., should belong to them, and that whatever the said G. A. Smith & Co. is entitled to recover against said bridge company on account of said claim, is a proper subject of recovery by said bridge company against the United States, and the amount thereof should be determined in said suit brought by the bridge company against the United States, so that all parties may be concluded thereby.

Now, therefore, in consideration of the premises, and of the payment of said sum of ninety-five thousand dollars by the said bridge company to the said G. A. Smith & Co., it is hereby agreed by and between said parties, as follows:

First. That all said payments made by said bridge company to said G. A. Smith & Co., as herein recited, as paid or agreed to be paid, shall be credited by said G. A. Smith & Co. on their whole account against said bridge company for materials furnished and labor performed in the masonry of said bridge from the beginning.

Second. That the said bridge company shall and will prosecute its suits against the United States for its entire claim, including that of the said G. A. Smith & Co., as set forth in said bill in equity and hereinbefore recited, being for said sum of two hundred and six thousand six hundred and fifty-eight $\frac{53}{100}$ dollars, with the assistance of the said G. A. Smith & Co. as to that claim, who are to intervene by leave of the court for their own interest, if they choose and appear by counsel in their own behalf, and to cause a special finding to be made of the amount due on account of that claim.

Third. That if in said suit against the United States the bridge company should, for any reason, fail to recover the said sum hereby agreed to be paid is accepted by said G. A. Smith & Co. in full satisfaction and payment of their whole claim against said bridge company; on the other hand, if the bridge company should in said suit recover and be awarded any sum on account of the said claim of G. A. Smith & Co. in excess of the sum of forty-four thousand two hundred and seventeen
272 $\frac{53}{100}$ dollars, being the amount herein agreed to be paid, to wit, ninety-five thousand dollars, less fifty thousand seven hundred and eighty-two $\frac{47}{100}$ dollars, the sum admitted by the bridge company in its answer in said action in the court of common pleas for this county, to be due to said G. A. Smith & Co., according to the terms of their contract, then the amount so recovered and decreed to be paid on account of said claim of the said G. A. Smith & Co. in excess of said sum above

mentioned, shall belong to and be paid over, when collected and received by said bridge company, to the said G. A. Smith & Co., on account of and in satisfaction of said claim.

Fourth. And said suit, now pending in the court of common pleas, of the said G. A. Smith & Co., against said bridge company, shall be dismissed, each party paying its own costs.

In testimony whereof the said G. A. Smith & Co., and the Newport and Cincinnati Bridge Company, by Alfred Gaither, its president, have caused this agreement to be signed and sealed with the corporate seal of said company on the day and year aforesaid, in duplicate.

{[NEWPORT & CINCINNATI BRIDGE COMPANY. INCORPORATED 1868.]}

GEO. A. SMITH & CO.
The NEWPORT & CINCINNATI BRIDGE COMPANY,
By ALFRED GAITHER, *President.*

In presence of—
STANLEY MATTHEWS.
GEO. R. SAGE.

Deposition of GEO. A. SMITH continued.

Redirect examination by GEO. R. SAGE, Esq.:

1. R. D. Q. In answer to cross-question 17 you say that the foundations below the surface of the ground are generally more profitable than the pier above the surface; how is it, if those foundations are in the river, under the water?

A. If a proper and sufficient coffer-dam is furnished, then it would be cheaper to lower the stone into the dam and build the foundation than to hoist the stone to any considerable height and construct the upper part of the pier; but the coffer-dam is sometimes very expensive and liable to leakage, and there are items of expense here that depend upon particular circumstances of each case; so that, if the contractor
273 has to furnish the coffer-dam and keep it in order, there is no telling anything about the expense of the foundation.

2. R. D. Q. Did the Bridge Company at any time, while you were negotiating or litigating with it, claim that, by any receipt you had given, you had cut off or waived any claim for extra compensation?

A. No; they never did. Mr. Wilson, on the contrary, told me that they did not make any such claim; that the receipts were in the usual form taken from all their employes.

3 R. D. Q. Please state whether the piers, as designed under the first plan, or as constructed under the second or low bridge plan, were to be or were at any line or angle with the channel or current of the river different from that of the piers of the bridge, as finally constructed, and as it now stands.

A. I don't think that the drawings, specifications, and measurements under the first plan for the location of piers, were so perfected as to show at what angle they would stand; if they were I never saw them; my work under that plan was mainly in getting out material. The piers under the second or low bridge plan stood at precisely the same angle to the current and to the channel as the piers now supporting the bridge; and, in fact, the river piers up to fifty feet above low water mark are the piers that were constructed under the second plan, and, as I have before stated, they were topped out for the bridge under the third plan.

GEO. A. SMITH.

STATE OF OHIO,
County of Hamilton, ss:

I, Charles C. Davis, a notary public of Ohio, in and for the county of Hamilton, do hereby certify that the above named George A. Smith was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the foregoing deposition was reduced to writing by me in the presence of the said witness, and by him subscribed in my presence; and was begun at the time and place specified in the notice hereto attached, and adjourned from time to time, by agreement, as noted; that I am not counsel or attorney herein, nor otherwise interested in the event of this action.

In testimony whereof, I have hereto set my hand and notarial seal, this March 6th, A. D. 1878.

[SEAL.] CHAS. C. DAVIS,
Notary Public, Hamilton County, Ohio.

Notary's fee $50, paid by Sage & Hinkle.
Filed March 9, 1878.

274 *Deposition of Richard C. Gray.*

United States circuit court, southern district of Ohio.

THE NEWPORT AND CINCINNATI BRIDGE COMPANY } No. 1729.
v.
THE UNITED STATES.

The plaintiff will take notice that on Tuesday, the 8th day of January, 1878, the defendant above named will take the depositions of Richard C. Gray, Joseph Walton, J. A. Blackmore, and William H. Brown, sundry witnesses, to be used as evidence on the trial of the above cause, at the office of the United States district attorney in Pittsburgh, in the county of Allegheny, in the State of Pennsylvania, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

WARNER M. BATEMAN,
Attorney for Defendant.

Service of the above notice is acknowledged, and proof of the official character of the officer before whom the said depositions may be taken is by agreement waived; also all exceptions in regard to time.

MATTHEWS, RAMSEY & MATTHEWS.
Attorneys for Plaintiff.

United States circuit court, southern district of Ohio.

THE NEWPORT AND CINCINNATI BRIDGE COMPANY } No. 1729.
v.
THE UNITED STATES.

Deposition of witness taken before me, Frank W. Smith, notary public within and for the county of Allegheny, in the State of Pennsylvania, on the 8th day of January, in the year 1878, between the hours of eight o'clock a. m. and six p. m., at the office of the United States district attorney in Pittsburgh, in said county, pursuant to the annexed notice, to be read in evidence on behalf of the defendant in said action.

No person appeared for the plaintiff.

H. H. McCormick, esq., United States district attorney, being present on behalf of the defendant.

275 RICHARD C. GRAY, of the city of Allegheny, county of Allegheny, and State of Pennsylvania, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, deposeth and saith:

I was one of a committee appointed to represent the river interests at Washington during the session of Congress in 1868. The business of said committee was to urge upon Congress the necessity of a general law for the bridging of the Ohio River in such a manner as to leave the navigation of the river safe and with as little obstruction as possible. We claimed that all bridges should have a main span over the channel of 500 feet, and a height of at least 40 feet above extreme high water. At that time we were aware that two bridges were in the course of construction—one at Bellaire, Ohio, and one at Parkersburg, W. V., and that these two bridges were to have main spans of only 300 feet and an elevation of 90 feet above low water, the Baltimore and Ohio railroad advocating these bridges, and the river interests opposing same.

The late Judge Headington, of Cincinnati, was present, representing the Newport and Cincinnati Bridge Company, and extremely anxious that the bill authorizing that company to erect a bridge on the Ohio should pass Congress at that session (which was near its close), promised our committee in the most positive manner, that if we would not oppose this bill, and get our representative, Hon J. K. Moorhead, not to object to its passage, that he, on behalf of the Cincinnati and Newport Bridge Company, would agree that said company would erect a bridge with a 400 foot span over the main channel, and of same height as the suspension bridge at Cincinnati, located about a quarter of a mile below the Cincinnati and Newport bridge.

Our committee, after conference with him, agreed if he would promise to use his influence to have the Bellaire and Parkersburg bridges of the same width of span and 90 feet high, waited on Gen. J. K. Moorhead and requested him not to object to the passage of the bill. Gen. Moorhead reluctantly consented to do so, and the bill was passed.

The action of the company in making a bridge of only 70 feet in height was fraudulent and in direct violation of the solemn agreement made with Judge Headington. The only question in controversy was the width of the span, we wanting 500 feet, and the bridge company insisting on 400 feet, Judge Headington conceding the height should be 100 feet, or as high as the suspension bridge at Cincinnati.

RICHARD C. GRAY.

Filed January 15, 1878.

276 I, Frank W. Smith, a notary public duly commissioned according to law, do hereby certify that Richard C. Gray was by me first sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him subscribed, as above set forth, was reduced to writing by myself in the presence of the witness, and was subscribed by said witness in my presence, and were taken at the time and place in the annexed notice specified; that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit.

FRANK W. SMITH,
Notary Public.

[SEAL.]

Deposition of Wm. E. Merrill and others.

Depositions of witnesses taken in an action pending in the United States circuit court, southern district of Ohio, wherein the Newport and Cincinnati Bridge Company is plaintiff, and the United States is defendant, and for the said defendant, taken before me, Florien Giauque, a notary public within and for Hamilton County, Ohio, by agreement of the parties, at the office of Warner M. Bateman, at Cincinnati, within said district, begun on Friday, April 27th, 1877, and continued from day to day as herein noted, and to be adjourned to such convenient times, under agreement of the parties, as may be desired or hereafter agreed upon, W. M. Ramsey, of Matthews, Ramsey & Matthews, being present for plaintiff, and W. M. Bateman for defendant.

WM. E. MERRILL, of Cincinnati, of lawful age, being first duly sworn by me to testify the truth, the whole truth, and nothing but the truth, in said cause, deposes as follows:

Q. 1. What is your name, residence, and occupation?

A. William E. Merrill; Cincinnati, Ohio; am major of engineers, U. S. Army.

Q. 2. How long have you been in the Engineer Corps, and where are you at present, and in what duty are you now engaged?

A. Since my graduation at the Military Academy in 1859, about eighteen years. I am now stationed at Cincinnati, Ohio, and am in charge of the improvement of the Ohio and Monongahela Rivers; have been on this duty about seven years.

277 Q. 3. What duty, if any, did you perform in connection with the bridges upon the Ohio River, and especially the Newport and Cincinnati bridge, in the year 1870, and under whose direction and authority was it done?

A. Sec. 5 of the act making appropriation for the improvement of rivers and harbors, approved July 11th, 1870, directed the Secretary of War to detail three engineers to examine and report on all bridges erected or in process of erection over the Ohio River, and to state whether or not they interfered or would interfere with navigation. In case of interference, the engineers were to report what changes should be made in these bridges. The board, as finally organized, consisted of Gen. Warner, Gen. Weitzel, and myself. The first bridge examined was the one then in process of erection between Cincinnati and Newport. The surveys and soundings were done by a party under the charge of Mr. J. P. Cotton, civil engineer, assisted by E. A. Chase and H. A. Bentley, civil engineers.

Q. 4. What examination and surveys did your board make and cause to be made of the Newport and Cincinnati bridge, under the orders given to you?

A. The map of the site of the bridge, for the distance of about a mile above and a mile below, was made on a scale of one inch to two hundred feet. The piers were exactly located, and the currents at the bridge site were carefully determined by observations with floats at different stages of water. An elevation of bridge was also prepared, commencing at the natural surface on the Ohio side and terminating at the natural surface on the Kentucky side, and a map on a small scale, showing about ten miles of the river above and below the bridge.

[illegible]state what kind and description of foundations and their con-

dition at the time of the survey did you ascertain to be under the piers of the main channel spans and adjoining spans of the bridge.

A. As all the piers were above water, we could obtain direct knowledge only of the width and amount of the rip-rap. Whatever information we acquired about the pier foundations was from testimony. On second thought, I recollect that the final rip-rap was not put in place until some time after our report was completed. When we examined the bridge, most, if not all, the coffer-dams still surrounded the piers.

Q. 6. State what you ascertained to be the situation of the piers of the channel span, and of the other piers situated in the bed of the river, as to the course of the current.

278 A. We ascertained that they varied about twelve degrees from parallelism. To have been parallel to the current, the upper ends of the piers should have been turned twelve degrees toward the north.

Q. 7. Please state how much this deflection in the line of the piers from the current of the river will reduce the width of the channel under the main span, and state in your answer all the material facts and elements entering into the calculation by which you reach the conclusion called for by the question, as to the available width for navigation.

A. Our observation on the current showed that the axis of the bridge was deflected twelve degrees from a line at right angles with the current, and that the piers, which are at right angles with the axis of the bridge, make an angle of twelve degrees with the current. The available width for navigation must necessarily be measured at right angles to the current, and therefore, in this bridge, the available width for navigation is considerably less than the space between the piers, being reduced both by the obliquity of the piers and the obliquity of the axis of the bridge. To determine the amount of reduction of available width for navigation, we draw lines parallel to the current and tangent to the inner sides of the two piers. The perpendicular distance between these two lines is the available width for navigation. In this particular case, the distance between the piers is four hundred and one feet three inches. This is reduced for navigation five feet five inches by the obliquity of pier No. three (3); three feet more by the obliquity of pier No. four (4); and eight feet seven inches by the obliquity of the axis of the bridge, making a total reduction of seventeen feet (17). The available width for navigation is, therefore, three hundred and eighty four feet three inches (384 ft. 3 in.)

The loss of available width due to the obliquity of pier No. three (3) is determined by multiplying twenty five feet six inches, which is the distance from the axis of the bridge to the point of tangency of the line drawn parallel to the current, by the tangent of twelve degrees, which is the angle of obliquity. The result is five feet and four tenths ($5\frac{4}{10}$ ft.), which is about the same as five feet five inches.

The loss of available width due to the obliquity of pier No. four (4) is obtained by getting the base of a triangle whose altitude is thirteen and a half feet, which is the distance from the axis of the bridge to the down-stream end of the straight part of the pier, and whose angle at the vortex is twelve (12) degrees. This gives a portion of the

279 distance sought, but not the whole, since the point of tangency of the line parallel to the current is farther down stream than the end of the straight portion of the pier, being at a distance from it of twelve (12) degrees, measured on the circular arc that bounds the down-stream end of the pier. This additional distance is the difference between the secant of twelve degrees, and the radius is the half width of the pier, which, in this case, is eight and three-eighths feet ($8\frac{3}{8}$

run of these two distances is within a small fraction of three feet. Therefore, the sum of the reductions of the available width due to the obliquity of the piers eight feet five inches, leaving of the original distance between the piers three hundred and ninety-two feet ten inches (392 ft. 10 in.), as measured on the axis of the bridge, but as this axis is deflected twelve degrees from perpendicularity to the tangents drawn parallel to the current, it must be multiplied by the cosine of twelve degrees to get the true distance between these tangents. By performing this multiplication we get three hundred and eighty-four feet three inches (384 ft. 3 in.), which is thus the available width for navigation between piers No. three (3) and four (4). I append to this answer a diagram marked A, illustrating in part the method of calculation described above. The special details of the calculations at piers four (4), six (6), and seven (7) are further illustrated by diagram hereto appended, marked C.

Q. 8. Please state the situation of the pivot pier with the pivot guard, and the permanent connection between the pivot guard and the pivot pier as to the line of the current and the axis of the bridge, as you found them at the time of your survey.

A. The line between the pivot guard and the pivot pier was parallel to the current and therefore made an angle of twelve (12) degrees with the perpendicular to the axis of the bridge.

Q. 9. State how piers five (5) and seven (7) were situated as to the axis of the bridge and the line of the current.

A. They were at right angles to the axis of the bridge, and therefore made angles of twelve (12) degrees with the line of the current.

Q. 10. State the distance between the faces of piers five (5), six (6), and seven (7), and the effect of their situation you have described, as to the current and the axis of the bridge, upon the available width of the span for navigation, and the process of calculation by what you arrived at your conclusion.

284 A. The distance between the faces of the piers five (5) and (6), as measured on the axis of the bridge, was one hundred feet six inches (100 ft. 6 in.); and the distance between the faces of Nos. [illegible] (6) and seven (7) was the same. The available width between piers five (5) and six (6) was ninety-three feet, which was determined in the following manner: The obliquity of pier five (5) takes off five (5) feet from the available width, which is obtained by multiplying twenty-three feet six inches (23 ft. 6 in.), which is the distance from the axis of the bridge to the point of tangency of the line drawn parallel to the current by the tangent of twelve (12) degrees. At the pivot itself there is a reduction of five inches from the available width, due to the fact that the tangent drawn parallel to the current touches the circle of the pivot at a point twelve (12) degrees below the axis of the bridge, as measured on the circle of the pivot pier. The amount is obtained by obtaining the difference between the *recant* of twelve degrees in a circle whose radius is the same as the pivot pier, namely, twenty-one and one eight' feet, and the radius itself. The sum of these two reductions is five feet five inches (5 ft. 5 in.), leaving a distance of ninety-five feet one inch (95 ft. 1 in.), measured on the axis of the bridge. Multiplying this by the cosine of twelve degrees we obtain ninety-three feet (93 ft.) as the true distance as measured at right angles to the line of the current. By a similar process we find that the available width for navigation between piers six (6) and seven (7) was ninety-five feet four inches (95 ft. 4 in.) I append to this answer a diagram, marked B, illustrating in part the method of calculation described above; and the details of the calcula-

tion as to piers six (6) and seven (7) are illustrated by diagram marked C, appended to a former page of this deposition.

Q. 11. State your opinion as to whether it was practicable to have constructed the piers of th's bridge parallel with the current of the river.

A. It would have been no more difficult to have constructed them originally parallel with the current than to construct them the way they were.

Q. 12. State whether there was any difficulty in ascertaining the line of the current at the point of the Ohio River where this bridge is constructed, and whether that line was available or not.

A. There was no difficulty in ascertaining it; and the lines of the current are practically parallel. A map was prepared under the direction of our board, showing the results of our surveys, indicating the lines of current and the methods by which these results were
285 ascertained, which map was an integral part of our report on this bridge, and accompanied the report to the Secretary of War, and is the basis, to a great extent, of the statements I have made in this deposition. The map or drawing now shown me, and certified to by John G. Park, major of engineers, is a copy of the map, prepared under the direction of our board, of our survey of the river at the site of this bridge. I affix my signature below the name of G. N. Warren, major of engineers, on said copy.

Examination adjourned to April 28, 1874.

Q. 13. At what stages of water were your surveys as to the currents of the river made, and what difference, if any, existed in the course of the currents at the different stages at which your examinations were made?

A. They were made when the river surface stood at six feet (6 ft.) and at ten and a half feet (10½ ft.), as shown by the gauge at the Cincinnati water-works. The observations showed that the lines of the current at the stage of ten and a half feet (10½ ft.) were deflected more towards the south, or towards the Kentucky shore, than the lines of the current at the stage of six feet (6 ft.). No observations were made at a higher stage than ten and a half feet (10½ ft.), because this was the highest stage of the river during the time of our observations. My experience, however, has shown me that at higher stages than ten and a half feet (10½ ft.) the deflection towards the Kentucky shore is still more marked. At such stages coal fleets are strongly drawn towards the Kentucky pier of the channel span, the angle between the line of the current and the pier increasing with the increase in depth of the river. The reason for this is that in high stages of water the influence of irregularities in the bed is greatly reduced, and the currents are free to conform to the general shape of the banks. From the mouth of the Little Miami down to the railroad rolling mill the current at high stages sets strongly against the concave bank, which is the right bank or the Ohio shore. Below the railroad rolling mill the current begins to swing over towards the Kentucky shore, the deepest part, or bight, of the next succeeding bend being at the mouth of the Licking River. The reason why the river currents, at lower stages, do not set more strongly into this bend at the mouth of the Licking River is, that there is a large rock, bar, or shoal in this bend, commencing at the foot of York street, in Newport, and ending just above the Covington pier of the Suspension Bridge. Opposite the mouth of the Licking River this bar extends to the middle of
286 the Ohio River; and as it is too hard to be affected by the cur-

rents, it pushes the low water current over against the Ohio shore along the front of the landing of the city of Cincinnati.

Q. 14. At which of the stages of water at which you made your observations did you fix the measure of deflection of pier from the line of the current at twelve degrees, as stated in your testimony above given, and did you estimate the difference in degrees or fractions of degrees between the two stages at which you made your observation?

A. The lines of current in a river are always more or less curved, and the determination of their exact direction is necessarily somewhat a matter of judgment. The map which accompanied our report shows the exact lines of current as we determined them; and from this map any engineer can now tell, as well as we could then, the angles made by the piers with the current. The map shows that the line of the pivot guard, as built by the bridge company, was substantially parallel to the lines of the current as determined by our observations. We therefore accepted this line as the line of the current, and our surveys showed that it made an angle of twelve (12) degrees with the axes of the piers.

Q. 15. With the channel piers founded upon clay or coarse gravel, would it be necessary to protect their foundations from scouring by the stream to surround them with rip-rap? and, if you know, state whether that has been done.

A. It would be necessary, and it has been done. The rip-rap around pier No. three (3) rises to a height of nine feet (9 ft.) above the zero of the Cincinnati water-works gauge. The rip-rap around all the piers is visible in ordinary low water, being at such stages above the water surface.

Examination adjourned to April 30th, 1877.

APRIL 30TH, 1877.

Cross-examination of WM. E. MERRILL, by plaintiff's counsel:

Q. 16. Who prepared the maps and elevation of bridge that accompanied the report to the Secretary of War?

A. It was done by Mr. Cotton, Mr. Chase, and Mr. Bentley, Mr. Cotton being the chief. The map was finished at Pittsburgh, under my direction, as I was the recorder of the board, and also the disbursing officer.

Q. 17. Did you personally make any of the surveys or soundings which were made by or on behalf of the Board of Engineers?

287 A. I did not.

Q. 18. By whom were they made?

A. They were made by Messrs. Cotton, Chase, and Bentley, under our direction.

Q. 17. The report of the board and your calculations, as stated in your testimony, are based upon the report of these gentlemen to the officers composing the board, are they not?

A. They are.

Q. 20. Did the report of the engineers to the Secretary of War contain any reference to, or recommendation concerning, the location of the piers with reference to the current?

A. Reference is made to it on page forty (40), in the report of this Board of Engineers; also on pages fifty-one and fifty-two (51 and 52).

Q. 21. Have you had any practical experience in building railroad bridges, or any bridges other than military bridges?

A. No. I have examined a great many professionally, but have never built any.

Q. 22. In your examination of the bridge in question, did you observe any reason why the alignment of the piers was made as it was?

A. The piers are built at right angles to the axis of the bridge, which is the usual method of construction. To have had the piers parallel to the current in the present case would have required that the axis of the bridge be swung twelve (12) degrees downstream from the Newport end as a center. This would have made the Cincinnati end of the bridge come about the foot of Pike street, and would have necessitated the purchase of additional property in Cincinnati, thus increasing the cost of the bridge. The distance from the center of Butler street to the center of Pike street, measured along Front street, is four hundred and sixty (460 ft.) feet, as shown by the map.

Q. 23. Is it not true that the Board of Engineers, whilst engaged in the examination of this bridge, was besieged by persons interested in river navigation, seeking to influence their judgment and action concerning this bridge?

(Objected to by defendant's attorney.)

A. We were interviewed by a large number of persons on both sides of the questions, the majority being opposed to the bridge.

Redirect examination of same witness, same date, by defendant's counsel:

Q. 24. Is it not practicable to build a bridge with the piers oblique to the axis of the bridge, and are not such bridges frequently built, and what are the engineering objections, if any, to such bridges?

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A. Bridges whose axes are not at right angles to the piers or abutments are called "skew bridges." They are very common on railroads where only short spans are needed, as for road and creek crossings. The objection to truss bridges on a skew is that the roadway bearers connect similar points on the two trusses, and are therefore parallel to the piers, while the cross-ties are at right angles to the track and oblique to the piers. The consequence is that similar members in the two trusses are not similarly loaded at the same time, thus causing a rocking movement in the bridge that is injurious. At the Bellaire bridge, where there is a small skew, the tops of the piers are at right angles to the axis of the bridge, but the rest of the pier is parallel to the current, being sufficiently increased in width to support the corners of the pier tops. Long span bridges ought always to rest on piers at right angles to the axis, and I know of none that are not so built.

Adjourned to May 1st, 1877.

MAY 1ST, 1877.

Redirect examination of Wm. E Merrill continued by defendant's counsel.

Q. 25. State whether or not, subsequently to the completion of the bridge, you made, or caused to be made, observations and survey of the amount, height, and breadth of the riprap around the base of the bridge piers; and, if so, please state the same as to the piers of the channel span of bridge. Append to the same a map or diagram of the same.

A. I made such a survey in September, 1873, in accordance with orders from the Chief of Engineers. The riprap around the channel piers was not put in until some months after the completion of the bridge, and, therefore, after the report of the Board of Engineers had been handed in. The survey in question was not limited to the Newport and Cincinnati bridge, but extended to the channel spans of all other bridges over

the Ohio river. It was ordered on account of the numerous complaints made by navigators of injuries received by coming in contact with the riprap around the channel piers of the Ohio River bridges. The surveys were made by my principal civil assistant, William Weston, C. E. They developed the fact that at ordinary low water, reading two and a half (2½) on the Cincinnati gauge, the riprap around pier No. three (3) was six (6) feet high against the pier, and projected thirty-one feet (31 ft.) into the channel space. The riprap around pier No. four (4)
289 was five feet and four-tenths (5.4 ft.) against the pier, and projected twenty-two feet (22 ft.) into the channel space. The available space for navigation, measured on the axis of the bridge, was three hundred and forty-eight feet and six-tenths (348.6 ft.), which distance would be still further reduced if proper allowance were made for the obliquity of the axis of the bridge. I append hereto, as explanatory of the above, a tracing of the original diagram that accompanied my report of the riprap around the Ohio River bridge piers. Said tracing is marked D.

Q. 26. Please to state what occasion there was for using riprap around the piers of channel span of this bridge?

A. The imperfect character of the foundations made the use of riprap necessary to prevent the piers from being overturned. Had the piers been founded upon rock, as they should have been, no riprap would have been necessary.

Q. 27. Would it have been practicable to have founded the piers upon the rock?

A. It was perfectly practicable.

Q. 28. State, if you know, what the present height is above low-water mark?

A. The height of the bridge above the zero (0) of Cincinnati Water-Works gauge is one hundred feet, as determined several times by actual measurements, one of which measurements was made by me personally. The low-water line is not well determined, but it is about two feet on the gauge—that is, about two feet above the zero on that gauge; and, therefore, the bottom of the bridge is about ninety-eight feet (98 ft.) above low-water mark. This mistake as to height was due to the fact that the board of engineers were given to understand that the zero (0) of the gauge was low-water mark, and as they were strangers in Cincinnati they had no reason to doubt the accuracy of the statement. It is very seldom that the Ohio is down to the low-water mark, and consequently the height of any given stage above low-water must depend on records or the reports of engineers.

Q. 29. Please explain what constitutes low-water mark, and how it is related to what is denominated the Cincinnati Water-Works gauge?

A. On Western rivers we understand by low-water the lowest water ever reached in the stream in question. Therefore the exact position of the low water mark in any river is determined by the past records of that river; but this low-water mark will be changed whenever the river falls below it. The low-water line, therefore, is not an absolute line, but
one that is temporarily fixed, and subject to change. In examin-
290 ing, some years ago, but subsequent to the report of the board of engineers on the Newport and Cincinnati bridge, in order to ascertain the exact position of low-water mark at Cincinnati Water Works and how it was determined, I was informed, from the city engineer's office, that when this gauge was constructed its zero was placed at such a depth below the water surface that the reading on the gauge would be eighteen inches or twenty inches (they didn't seem to be sure which)

when there was that depth of water on Four-mile Bar, about ten miles above Cincinnati. This depth of water is assumed to be the extreme low-water depth on this bar, which is the worst in this neighborhood. If, therefore, the gauge is correctly set, the height of any object above low-water can be determined by referring it to this gauge, and subtracting eighteen or twenty inches from its reading on this gauge.

As a matter of fact, the lowest stage to which the river has fallen since 1857, the date at which the regular series of daily observations began, is two feet four inches (2 ft. 4 in.) on this water-works gauge. I should therefore infer that the gauge was incorrectly set, and that the true low-water mark at Cincinnati is two feet four inches on the water-works gauge.

Q. 30. In the change which was made in the plan of the bridge in the construction of its piers, what change of batter was required to be made and what recutting of the stone taken from the piers partly or wholly torn down would be necessary to conform to the change of batter in rebuilding them?

A. The old batter was half an inch to the foot, or one inch in two feet. The present batter is one inch in four feet and sixty-two hundredths of a foot. The stones of which the piers are built are about sixteen inches in thickness. With such a thickness the old batter would have been two-thirds of an inch. The new batter is twenty-nine hundredths of an inch, making the change in batter in a sixteen inch stone about three-eighths of an inch. In rock faced masonry, such as is used in these piers, I would not consider it necessary to re-cut the faces of the stones, but would prefer to let each face stone overlap the stone below it three-eighths of an inch. The joints would thus be better protected from the weather, and the effect of the masonry would not be at all injured.

Q. 31. Please state the height above low-water mark of the string courses and of the tops of the main channel piers, and by what means you obtained the information you give in answer to this question?

291 A. Since the beginning of this testimony I caused an examination to be made of these channel piers, and had the heights of various parts of the bridge and of the piers carefully measured. I found the tops of the channel piers as they now stand to be one hundred and one feet and seventy-five thousandths of a foot (101.075) above low-water mark, and the tops of the string courses to be fifty-one feet and eighty-five hundredths of a foot (51.85) above low-water mark.

Q. 32. Mr. Smith, in answer to question twenty-three (23), in his examination in chief, says that, in raising piers Nos. seven, eight, and nine (7, 8, and nine), they employed one set of jacks only in raising the two spans which had been finished upon them. State your view as to the convenience and economy of this process, compared with others that might have been used.

A. The process strikes me as decidedly uneconomical. Each pier should have been supplied with its own set of jacks, which should have remained on their appropriate piers until their work was done.

Q. 33. In the same answer, Mr. Smith has also stated that, by reason of the immense weight resting on piers eight and nine (8 and 9), it became necessary to strengthen them by castings and bolts. What is your opinion as to the correctness of this answer?

A. The facts are as stated by Mr. Smith, but he entirely misapprehends the reason for this arrangement, there being less weight on piers eight and nine (8 and 9) than on several others. These castings were introduced because the ends of these piers were cut off, in order to permit the passage of the roadway. This brought the weight of the trusses

so near the upstream and the downstream edges of the tops of these piers, that there was danger that *that* the end stones would be crushed, and for this reason they were encased in iron castings.

Q. 34. Will you please look at the statement of Mr. Wilson, in answer to question one hundred and thirty-two (132), as to piers three and four (3 and 4), and state whether or not the same is correct as to the amounts of the piers removed and rebuilt?

A. I think he made some small mistakes in his measurements. According to the present height of the string courses of piers three and four (3 and 4) above low-water mark, he must have torn twenty-one feet and fifteen-hundredths of a foot (21.15 ft.) from pier No. three (3) and three (3) feet less from pier No. four (4), and he must have rebuilt forty-nine feet and twenty-three hundredths of a foot (49.23 ft.) above each string course, instead of forty-nine feet and a half (49.5 ft.), as he gives it.

WM. E. MERRILL.

292 *Benjamin Eggleston.*

NOV. 1ST, 1877.

By virtue of an agreement between the attorneys in this cause, whereby witnesses were to be examined at any time, and the testimony to be submitted for examination by the opposite party, Benjamin Eggleston was examined on the date above written, and the testimony given by him examined by attorneys of complainant.

BENJAMIN EGGLESTON, of lawful age, being by me first duly sworn, deposes and says as follows:

Q. 1. State your name, residence, age, and occupation?

A. Benjamin Eggleston; age, sixty years; residence, Cin'nati; occupation, commission merchant—one of the firm of Wilson, Eggleston & Co.

Q. 2. What connection had you with the national service in 1868 and 1869?

A. I was a member of the House of Representatives of the Thirty-ninth and Fortieth Congress, closing March 4th, 1859.

Q. 3. State, if you know or recollect, upon whose application the joint resolution of March 3d, 1869, giving the assent of the United States to the construction of the Newport and Cincinnati bridge, was considered and adopted by Congress, or as the result of what previous controversy, if any, was it adopted?

A. I cannot state who made the first application to Congress, but Judge Headington, of Cincinnati, as the representative or attorney of the Cincinnati and Newport Bridge Company, appeared there and pressed the passage of the resolution. He assured me that the bridge is the height contemplated by the resolution was to be the same as the wire suspension bridge at Cincinnati. I introduced him to the committee having the subject in charge, and they, the committee, made a favorable report, and the resolution passed the House just before the adjournment of the Fortieth Congress.

Q. 4. What was the height of the suspension bridge at Cincinnati?

A. I always understood it to be one hundred feet (100 ft.) above low-water mark, and that was referred to as establishing a uniform height of bridges at Cincinnati.

Q. 5. During the pendency of the joint resolution referred to, what other interest was represented beside the bridge company in its consideration by the two Houses, and, if any, what were those interests?

293 A. There were some organizations there and some individuals anxious to keep the Ohio River free from obstructions, and urging members to pass nothing that would permit the construction of any bridge across that river lower than one hundred feet or lower than the said suspension bridge, and wanting the span at not less than five hundred feet over the main channel. But, finally, all differences were compromised in making the span four hundred feet (400 ft.) and, as I understood it, and as I think all others understood it who are interested in the navigation of the Ohio River, the height of the bridge was to be the same as the height of the suspension bridge at Cincinnati.

Q. 6. Where did the committees or persons to whom you have referred reside, and what interests, so far as you can remember, did they represent?

A. I cannot state where many of them resided, but I remember one delegation from Pittsburgh and individuals from various river towns. They seemed to have no other interest there in this case than to keep the river free and unobstructed. They represented the mercantile and boating interests of the river towns.

Q. 7. What degree of inducement was there in the assurance of the agent of the bridge company that the height of the bridge should be the same as the suspension bridge *was there* for you and others to vote for the joint resolution.

A. I never should have voted for the resolution but for the assurance that the height was to be the same as the height of the suspension bridge, and I am sure that no other member of the House, who was friendly to the Western river interests, would have voted for the resolution without such assurance, and I am quite certain that the resolution would have been overwhelmingly*ly* defeated if such assurance had not been given.

BENJ. EGGLESTON.

(Each and every one of the foregoing questions and answers objected to by complainant.)

James K. Moorhead.

DEC. 12, 1877.

In accordance with agreement referred to at the beginning of Benjamin Eggleston's testimony, James K. Moorhead was examined on above date, and his evidence submitted as before mentioned.

JAMES K. MOORHEAD, of lawful age, being by me first duly cautioned and sworn, deposes and says as follows:

Q. 1. State your name, age, residence, and occupation?

294 A. My name is James Kennedy Moorhead; reside in the city of Pittsburgh; have been a manufacturer, but my business now is president of the Monongahela Navigation Company; am aged seventy-one years.

Q. 2. What connection had you with the national service in 1868 and 1869 and previous?

A. I was a member of the Thirty-sixth, Thirty seventh, Thirty-eighth, Thirty ninth, and Fortieth Congresses, the latter of which adjourned on the fourth of March, 1869.

Q. 3. State, if you know or recollect, upon whose application the joint resolution of March 3d, 1869, giving the assent of the United States to the construction of the Newport and Cincinnati Bridge, was considered and adopted by Congress, or as the result of what previous controversy, if any, was it adopted?

A. My recollection is that the joint resolution was called up by General Cary. The bridge company were anxious about its passage before Congress adjourned. A committee of my constituents, representing the coal and steamboat interests, were there at the time, to prevent any action that would authorize any obstruction of the Ohio River. They called on me, and informed me they had an understanding with Judge Headington and others, representing the bridge company, and requested me to vote for the resolution. Upon examination of the resolution, I discovered or learned that the act of July 14, 1862, was made applicable to it, and as this act permitted the alternative of a draw, I objected to voting for it. But upon assurances from them and from others, especially Judge Headington, who was representing the bridge company, and was brought by the committee to me, to satisfy my doubts, and gave assurances that the bridge should be as high as the Cincinnati and Covington Suspension Bridge, I yielded and let the bill pass, as one objection would have defeated it at that stage of the session.

Q. 4. Will you state, as nearly as you can recollect, what were the statements of Judge Headington, representing the bridge company, made to you as to the plans and purposes of the company as to the height of the bridge?

A. I would not, at this distance of time, pretend to give the exact language of Judge Headington, but representing my constituents, who were largely interested in the steamboat business, I was fully determined that no bridge should be erected here without a channel span one hundred feet high or as high as the Cincinnati Suspension Bridge, as I stated before, and his assurances satisfied me that it was the intention of
295 the bridge company to build their bridge at that elevation. But for that I would have opposed the resolution.

Q. 5. Do you remember any other person assuming to represent the bridge company in reference to the joint resolution beside Judge Headington?

A. I do not.

Q. 6. State whether or not, in your judgment, a majority of the House could have been obtained in favor of that joint resolution without the assurances given by the agents of the bridge company, or Judge Headington, as to the height of the bridge?

A. I am very clearly of the opinion that, without those assurances, a majority of the House could not be obtained in favor of that joint resolution.

J. K. MOOREHEAD.

(Each and every one of the foregoing questions and answers objected to by complainant.)

William Weston.

WILLIAM WESTON, of lawful age, being first duly sworn by me to testify the truth, the whole truth, and nothing but the truth, deposes as follows:

Q. 1. State your name, residence, and occupation.

A. William Weston; am employed at the United States engineer's office, 82 W. Third street, Cincinnati, which city is also my residence; am a civil engineer by occupation.

Q. 2. Please to look at Exhibit D annexed to the deposition of Col. Wm. E. Merrill, and state whether it illustrates a survey made by you, under the direction of Col. Merrill, on the 22d of September, 1873, of the piers of the channel span of the Newport and Cincinnati bridge.

A. It does. I made the tracing here marked Exhibit D, the original map from which the tracing was made, and also made the survey of the riprap about said bridge piers.

Q. 3. Please to state whether said tracing and survey are accurate, and from actual measurements.

A. They are: the measurements were made by me, and they correspond with those given on the plat. The stage of the water at the time of taking the measurements was four feet four inches by the Cincinnati gauge, and the riprap was so exposed that I was enabled to make very careful measurements.

296 Q. 4. State what you mean by Cincinnati gauge, and what relation that bears to what is denominated low-water mark. Do they coincide? If not, what is the difference, and which is the higher?

A. The gauge fixed upon the buildings of the Cincinnati Water Works something less than a quarter of a mile above this bridge, and on the river bank, is what I mean by the Cincinnati gauge. There is considerable difference of opinion as to what low-water reads on this gauge. The lowest water recorded since 1858 is, I think, two feet three inches (2 ft. 3 in.). Medium low-water on Exhibit D I have taken at thirty inches (30 in.) by this gauge. The low-water assumed in city levels is about twenty inches.

Examination of said Weston was then adjourned, under an agreement to that effect between the said attorneys, to some convenient future time.

Examination resumed February 2d, 1878.

Since giving the above testimony I have referred to measurements and notes made by me, and find that the lowest water since 1858 was in October, 1862, and reads two feet four inches (2 ft. 4 in.) on the water-works gauge. By the city levels, low-water is taken at one foot four inches (1 ft. 4 in.) on the same gauge.

I find, upon examination, that I have nothing further to add to my testimony in reply to the above question.

WM. WESTON.

Samuel F. Cary.

NOVEMBER 7TH, 1877.

In accordance with the agreement referred to at the beginning of Benjamin Eggleston's testimony, Samuel F. Cary was examined on above date, and his evidence submitted as before mentioned.

SAMUEL F. CARY, being first duly sworn by me, and being of lawful age, deposes and says as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Samuel F. Cary; age sixty-three years; occupation, attorney, and residence Hamilton.

Q. 2. What connection had you with the national service in 1868 and 1869?

A. I was a member of the Fortieth Congress, which closed in March, 1869.

Q. 3. State, if you know or recollect, upon whose application the joint resolution of March 3d, 1869, giving the assent of the United
297 States to the construction of the Newport and Cincinnati bridge, was considered and adopted by Congress, or as the result of what previous controversy, if any, was it adopted?

A. I don't recollect distinctly upon whose application the subject was introduced. It was, however, the subject of an exciting controversy, and those interested in the navigation of the river were persistent in demanding that no bridge should be constructed across the channel of less than five hundred feet (500 feet) length of span and one hundred feet (100 feet) height above low-water, and I was deeply interested in that side of the question myself, believing that the public interest required that the Ohio River should be unobstructed, and that a shorter or lower height than that mentioned would be a serious obstruction to the navigation of the river. Judge Headington, of Cincinnati, was there, representing the interests of the Newport and Cincinnati Bridge Company. The session was drawing near its close, and it was regarded as important for the interests of all concerned that action be taken before Congress adjourned. Being assured by those prominently interested in the navigation of the river that a span of four hundred (400) feet across the channel would not seriously embarrass the free navigation of the river, a compromise was agreed upon by the parties interested, that that should be the width of the bridge, and that the height of the channel span should be the same as that of the suspension bridge ot Cincinnati. It was distinctly stated by Judge Headington in behalf of the bridge company that it was proposed to make the channel span one hundred feet high above low-water, and that with that understanding I called upon General Moorhead, Member of Congress from Pittsburg, and upon other members, interested in the navigation of the Ohio River, and the resolution was passed as a compromise.

Q. 4. During the pendency of the joint resolution referred to, what other interest was represented, beside the bridge company, in its consideration by the two houses, and, if any, what were those interests?

A. The river men, steamboatmen, and merchants interested in the navigation of the river, and I think the Board of Trade of Cincinnati, and other places, took an active interest in the subject.

Q. 5. What do you mean by the statement that the bridge company "proposed" to construct a bridge a hundred feet high?

A. I understood from Judge Headington that their plans already determined upon provided for a bridge of that height.

298 Q. 6. What degree of inducement was there in the assurance of the agent of the bridge company, that the height of the bridge should be the same as *as* the suspension bridge, *was there* for you and others to vote for the joint resolution?

A. I am very sure that I would not have supported it, and I do not believe that it would have been possible to have passed that resolution unless such assurance had been given. The reason why the height of the bridge was not inserted in the resolution was twofold. The first was because the session was so near its close that an amendment to the resolution would have defeated its passage at that session, and, second, because the plan already adopted by the bridge company, as their agent assured us, rendered it unnecessary.

S. F. CARY.

(Each and every one of the foregoing questions and answers objected to by complainant.)

STATE OF OHIO,
Hamilton County, ss:

I, Florien Gianque, a notary public within and for said county and State, duly commissioned and qualified, do hereby certify that the above-

named William E. Merrill, William Weston, Benjamin Eggleston, Samuel F. Cary, James K. Moorehead were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth in said cause, and that the depositions by them subscribed as above set forth were reduced to writing by myself in the presence of the witnesses respectively, each witness's testimony having been first read by me to said witnesses respectively, and the witnesses having expressed themselves respectively satisfied with said answers as written, and that said depositions were respectively subscribed by said witnesses in my presence, and were continued from time to time as above set forth, and that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand and official seal this sixth day of March, A. D. 1878.

[SEAL.] FLORIEN GIAUQUE,
Notary Public, Hamilton County, Ohio.

Filed March 8, 1878.

299 And afterwards, to wit, on the eleventh day of April, in the year of our Lord one thousand eight hundred and seventy-eight, an entry was made upon the journal of said court, in said cause, clothed in the words and figures following, to wit:

Final decree.

THE NEWPORT AND CINCINNATI BRIDGE COMPANY *vs.* THE UNITED STATES. } Chancery.

This cause came on for hearing upon the pleadings and the evidence, and was argued by counsel; and the court being fully advised in the premises finds that, at and before March 3d, 1871, the complainant was engaged in the erection of a bridge at the place, and of the kind described in the bill, and was, in all respects, constructing the same so as substantially to comply with the provisions of the law relating thereto; and the court further finds that the equity of the cause is with the defendant, and that the United States is not liable to the complainant on account of the matters and things alleged in said bill. The court therefore does now dismiss the bill of the complainant and adjudges that the complainant shall pay the costs of the cause, and execution is awarded therefor.

And thereupon the complainant prayed an appeal to the Supreme Court and gave notice thereof to the defendant, and the court allows said appeal and fixes the amount of the bond for appeal at the sum of five hundred dollars.

300 And afterwards, to wit, on the twelfth day of April, in the year last aforesaid, came the said complainant and filed in the clerk's office of the court aforesaid its certain appeal bond in said cause, clothed in the words and figures following, to wit:

Know all men by these presents that the Newport and Cincinnat Bridge Company, principal, and J. N. Kinney and A. D. Bullock are firmly held and bound unto the United States in the sum of five hundred

dollars, for the faithful payment of which, well and truly to be made, we do hereby bind ourselves, jointly and severally, and our heirs, executors, administrators, and assigns firmly by these presents. Signed and sealed by us on this 12 day of April, A. D. 1878.

The condition of the above obligation is such that whereas the said Newport and Cincinnati Bridge Company, as aforesaid, has obtained an allowance of an appeal from the circuit court of the United States for the southern district of Ohio in a case wherein the said Newport and Cincinnati Bridge Company is plaintiff and the said United States of America is defendant, in which a decree was entered on the eleventh day of April, 1878. And the said Newport and Cincinnati Bridge Company, praying an appeal to the Supreme Court of the United States, an appeal was allowed upon said Newport and Cincinnati Bridge Company filing an appeal bond in the sum of five hundred dollars.

Now, therefore the condition of this obligation is such that if the said Newport and Cincinnati Bridge Company shall, with all practicable speed, cause a transcript of the record of said cause to be filed with the clerk of the Supreme Court of the United States and prosecute said appeal to effect and answer all costs if they fail to make good their appeal, and abide by all orders and decrees which may be made and rendered by the said Supreme Court of the United States, then these presents shall be void. Otherwise to be and remain in full force, virtue, and effect.

301 THE NEWPORT AND CINCINNATI BRIDGE CO.,
By ALFRED GAITHER, *President.* [SEAL.]
A. D. BULLOCK. [SEAL.]
J. N. KINNEY. [SEAL.]

Signed, sealed, and delivered in the presence of—
J. W. SCHRAGE.
L. C. WEIR.
SETH EVANS, as to J. N. Kinney.

Approved.

PHILIP B. SWING, *Judge.*

302 THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss.:

I, Thomas Ambrose, clerk of the circuit court of the United States for the sixth judicial circuit and southern district of Ohio, hereby certify the foregoing to be a true and correct transcript of the record and proceedings in the case wherein the Newport and Cincinnati Bridge Company is complainant, and the United States of America is respondent, as the same remain in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Cincinnati this eighteenth day of July, A. D. 1878, and in the one hundred and third year of the Independence of the United States of America.

Attest:
[SEAL.]

THOS. AMBROSE,
Clerk U. S. Circuit Court, S. D. O.

(Indorsement on cover:) No. 511. The Newport and Cincinnati Bridge Company, appellant, vs. The United States. S. Ohio, C. C. U. S. Filed 7th October, 1878.

Supreme Court of the United States.

OCTOBER TERM, 1880.

THE NEWPORT AND CINCINNATI BRIDGE COMPANY,

Appellant.

vs.

THE UNITED STATES,

Appellee.

IN EQUITY.

APPEAL FROM THE SOUTHERN DISTRICT OF OHIO.

ARGUMENT FOR APPELLANT.

STANLEY MATTHEWS.
WM. M. RAMSEY.

Robt. Clarke & Co., Prs., 65 W. Fourth St., Cin.

UNITED STATES OF AMERICA.

SUPREME COURT OF THE UNITED STATES.

The Newport and Cincinati Bridge Company,

Appellant,

vs.

The United States,

Appellee.

Appeal from the Circuit Court for the Southern District of Ohio.

ABSTRACT OF PLEADINGS.

THE BILL alleges:

1. That the State of Kentucky, on February 5, 1868, passed an act to incorporate the Newport and Cincinnati Bridge Company, with authority to build a bridge across the Ohio river between Newport and Cincinnati, *provided that said bridge should be so constructed as not to obstruct the navigation of the Ohio river further than the laws of the United States authorize.* Kentucky charter, Feb. 5, 1868.

2. That by an amendment thereto, said company was authorized to become merged into a new corporation with any bridge company organized under the laws of Ohio to build a bridge across the Ohio river in the manner therein described; the consolidated company to be deemed one corporation in said state, with the fran- Amendment to same.

chises and subject to the disabilities of said company under its charter and the amendment thereto.

Ohio Law, April 3, 1868.

3. That on April 3, 1868, the General Assembly of Ohio passed an act for the creation of corporations for the construction of bridges across the Ohio river, "*either with a single span or with a draw, as the company might determine; but in either case, in order that said bridge might not obstruct the navigation of said river, the same should be built in accordance*" *with the act of Congress of July* 14, 1862, *or of an act that Congress might thereafter pass on the subject;* with power to consolidate with any bridge company in an adjoining state, having like authority; with the further proviso, that any such company might fix or change the span and altitude of any bridge which it might erect and construct across the Ohio river; provided, that the span of any such bridge be not less than three hundred feet in the clear over the main channel and not less than two hundred and twenty in the clear in one of the next adjoining spans and the height of the bridge, in the center of the span over the main channel, should not be less than one hundred feet above the surface of the water, at low water, measuring for such elevation to the bottom chord of the bridge and such height above extreme high water as might be provided in any act of Congress then in force, or which might thereafter be passed, *but that these restrictions should not apply to any bridge built with a draw, in accordance with the provisions of an act of Congress approved July* 14, 1862, *entitled, etc., or any act that Congress might thereafter pass on the subject.*

4. That on April 3, 1868, an association was formed and organized into a corporation by the name of the Newport and Cincinnati Bridge Company, under said mentioned act. Organization of Ohio corporation, April 3, 1868.

5. That on April 16, 1868, the Kentucky and Ohio corporations were consolidated under the same name, with a capital stock of $1,200,000, and is the plaintiff in this suit. Consolidation, April 16, 1868.

6. That by a joint resolution of Congress, approved March 3, 1869, it was resolved "that the consent of Congress be and the same was thereby given to the erection of a bridge over the Ohio river from the city of Cincinnati, Ohio, to the city of Newport, Kentucky, by the said The Newport and Cincinnati Bridge Company, a corporation chartered and organized under the laws of each of the States of Kentucky and Ohio; provided, that said bridge is built with an unbroken or continuous span of not less than four hundred feet in the clear from pier to pier, over the main channel of the river, and is built in all other respects in accordance with the conditions and limitations of an act entitled 'an act to establish certain post roads,' approved July 14, 1862; that said bridge, when completed in the manner specified in the said resolution, should be deemed and taken to be a legal structure, and should be a post road for the transmission of the mails of the United States;" *but Congress reserved therein the right to withdraw the assent thereby given, in case the free navigation of said river should at any time be substantially and materially obstructed by any bridge to be erected under the authority of the said resolution, or to direct the necessary modifications and alterations of said bridge.* Joint resolution of Congress, March 3, 1869. Proviso as to 400 feet span. Reservation of right to withdraw assent.

Sec. 4, Act of Congress, July 14, 1862.

7. That, by the 4th section of the said act of Congress of July 14, 1862, it was enacted, that any bridge erected under the privileges of the said act, might, at the option of the company building the same, be built *either as a draw bridge*, with a pivot or other form of draw, *or with unbroken or continuous spans;* provided, that if said bridge should be made with continuous or unbroken spans, it should not be of less elevation than ninety feet above low water mark over the channel of the said river, nor in any case less than forty feet above extreme high water, as understood at the point of location, measuring for such elevation to the bottom chord of the bridge; nor should the span of such bridge, covering the main channel of the river be less than three hundred feet in length, with also one of the next adjoining spans of not less than two hundred and twenty feet in length, *and the piers of said bridge should be parallel with the current of the river, as near as practicable;* and provided, also, that if any bridge under said act should be constructed *as a draw bridge*, the same should be constructed with a span over the main channel of the river, as understood at the time of the erection of the bridge, of not less than three hundred feet in length, and said span should not be less than seventy feet above low water mark, measuring to the bottom chord of the bridge, and one of the next adjoining spans should not be less than two hundred and twenty feet in length; and, also, that there should be a pivot draw constructed in every such bridge, at an accessible and navigable point, with spans of not less than one hundred feet in length on each side of the central or pivot-pier, of the draw; and, provided also, that said

Proviso as to bridges with continuous spans.

Proviso as to draw bridges.

bridge should always be opened promptly, upon reasonable signal for the passage of boats, whose construction might not at the time admit of their passing under the permanent spans of said bridge; except that said draw should not be required to be opened when engines or trains were passing over said bridge, or when passenger trains were due, but in no case should unnecessary delay occur in the opening of said draw after the passage of said engines or trains; and by the 5th section of said act, it was enacted that any bridge erected under the provisions of said act, should be lawful structures, and should be recognized and known as post routes; and that the officers and crews of all vessels, boats, or rafts navigating the Ohio river, were required to regulate the use of the said vessels and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation, construction, or use of any of the bridges erected or legalized under the provisions of the said act.

8. That the plaintiff, under the authority of the laws of Kentucky and Ohio, and the said joint resolution and act of Congress, *and in conformity with the provisions thereof*, about March 1, 1869, commenced the construction of a bridge across the Ohio river, from Newport to Cincinnati, according to a plan, a drawing of which is exhibited.

Construction of bridge commenced, March 1, 1869.

The chief object in the construction of the same was to furnish means of connecting the railroads terminating in Cincinnati and Newport, and thus to form a continuous line of railway between the eastern cities and the Southwestern States, and especially to connect the tracks and depot of the Little Miami Railroad, in Cincinnati, with the terminus of the Louisville, Cin-

Railroad bridge.

cinnati and Lexington Railroad Company, in Newport, the charters and laws authorizing the construction of said bridge for ordinary highway and railroad purposes.

9. That owing to the proximity of the terminus of the Little Miami Railroad in Cincinnati to the site necessarily selected for the bridge, and the sharp curvature necessary to connect the tracks of that road with the bridge, it was deemed most expedient and advisable to avoid the excessive grades necessary to attain the high level required for a bridge with unbroken or continuous spans, of an elevation not less than ninety feet above low water mark over the channel of the river at the point of location, and not less than forty feet above extreme high water, measuring for such elevation to the bottom chord of the bridge; and it was therefore determined by the company to adopt the alternative authorized by the 4th section of the act of Congress of July 14, 1862, *by building the same as a draw bridge with a pivot draw, the span over the main channel being unbroken and continuous, not less than four hundred feet in the clear from pier to pier*, as required by the joint resolution of Congress of March 3, 1869, and not less than seventy feet above low water mark, measuring to the bottom chord of the bridge and one of the next adjoining spans not less than two hundred and twenty feet in length, with a pivot draw at an accessible and navigable point, with spans of not less than one hundred feet in length on each side of the central or pivot pier of the draw, the piers of said bridge being made parallel with the current of the river as near as practicable.

Alternative of draw bridge adopted.

10. That the position of the main channel of the river at the proposed site of the bridge was found and

Location of channel span and draw span.

ascertained ; and being at that point close to the Ohio shore, it became necessary that the next adjoining span, required to be two hundred and twenty feet wide, should be placed south of the four hundred feet span over the main channel, and that the pivot span should be located next adjoining and south of the two hundred and twenty feet span, which would, however, leave it an accessible and navigable point of the river when the water was at a stage making it important or desirable for boats to pass through the draw span.

Plan of bridge.

11. That a design for said bridge was adopted, and is minutely described by reference to the exhibit.

Cost of bridge, at contract prices, $1,110,186.88.

12. That contracts for its construction were entered into, under which the said bridge, completed as described, would have cost, in the aggregate, one million one hundred and ten thousand one hundred and eighty-six dollars and eighty-eight cents.

Work prosecuted according to plan until March 1, 1871.

13. That the plaintiff prosecuted the work in the construction of the said bridge, according to the said plans, during the years 1869, 1870, and until the 1st day of March, 1871, it was nearly completed ; the work then done being specified ; and the actual cost of which was, in the aggregate, eight hundred and seven thousand four hundred and thirty-five dollars and forty-one cents ; and the unfinished portion of the work could have been completed at a cost not exceeding the remainder of the contract prices, as above set forth.

Actual cost of work done, $807,435.41.

5th sec., Act of Congress of March 3, 1871, prohibiting the erection and use of the bridge, unless, etc.

14. That by the 5th section of an act of Congress, making appropriations for the service of the postoffice department for the year ending June 30, 1872, and for other purposes, approved March 3, 1871, it was enacted that it should be unlawful for the Newport and Cincin-

nati Bridge Company, or any other person, to proceed in the erection of the said bridge, unless the same should be so constructed that the channel span of four hundred feet, as then located, should have under said span a clear headway, at low water, of one hundred feet below any point of said channel span, and in such case no draw should be required in said bridge; all the other spans of said bridge which cover the Ohio river at low water mark should have a clear headway of not less than seventy feet above low water mark; and the other spans of said bridge, extending to each shore, might be made of less elevation than seventy feet above low water mark, to accommodate a regular grade for the approaches to said bridge; and that when the foregoing requirements should have been complied with by the complainant, the location of the bridge, its structure and approaches, should thereupon be deemed to be legalized and declared to be a lawful structure, and should be recognized and known as a post road; and it was also thereby provided that the plans for changes in said bridge, made necessary by the said act, should be submitted by the company to the secretary of war for his approval.

Further work suspended.

15. That the plaintiff immediately suspended all further prosecution of the work upon said bridge upon the place aforesaid, and adopted a new plan, which was submitted to the secretary of war for his approval, who approved the same August 23, 1871, a description of which is set out by reference to a drawing thereof exhibited; that the same required new work and changes of work previously done, as specifically described; the

New plan adopted and approved by the War Dept.

actual, necessary, and reasonable cost of which was *three hundred and one thousand eight hundred and seventeen dollars*, increased by interest on the capital previously invested for the period of the delay, occasioned by the requirement to alter the plan, about eight months, amounting to *forty-eight thousand nine hundred and seventy-four dollars and ninety-five cents*, and the damages claimed by G. A. Smith & Co., for the breach of their contract by the plaintiff, made necessary by the change of plan, amounting to *two hundred and six thousand six hundred and fifty-eight dollars and fifty-three cents*, making the gross amount of *five hundred and fifty-seven thousand four hundred and fifty dollars and forty-eight cents.*

Necessary and reasonable cost of making the changes required, $301,817.00.

Interest on previous investment, $48,974.95.

Claim of G. A. Smith & Co., $206,658.53.

Total claim, $557,450.48.

16. That by the said act of Congress of March 3, 1871, it was also provided that, in the event of the complainant making the changes in said bridge provided for in said act, it should be lawful for the complainant, after it should have made the said changes in said bridge and approaches, to file its bill in equity against the United States, in the Circuit Court of the United States for the Southern District of Ohio, and full jurisdiction was thereby conferred upon said Court to determine, *first*, whether the bridge, according to the plans on which it had progressed, at the passage of said act, *had been constructed so as substantially* to comply with the provisions of law relating thereto; and, *second*, *the liability of the United States if any there be* to the complainant *by reason of the changes by the said act required to be made;* and if this Court should determine that the United States *is so liable*, and that the said bridge was so being built, then the said Court should further ascertain and determine the amount of the *actual and necessary*

Act of Congress, March 3, 1871, authorizing suit.

Jurisdiction conferred.

Questions to be determined.

Rule of damages.

cost and expenditures reasonably required to be incurred in making the changes in the said bridge and its approaches, as thereby authorized or required, *in excess* of the cost of building said bridge and approaches according to the plan proposed before the changes required by said act to be made, and the said Court was thereby further authorized and required to proceed therein to to final decree as in other cases of equity.

17. That in pursuance of said act of Congress this bill is filed, and the plaintiff further alleges:

Bridge as built conformed to the existing law.

1. That said bridge, according to the said plan on which it had progressed at the passage of the said last mentioned act of Congress, had been constructed so as substantially to comply with the provisions of law relating thereto, viz., the joint resolution of March 3, 1869, and the act of Congress of July 14, 1862.

If completed, would not have been a substantial and material obstruction to navigation.

2. That said bridge, as erected under said plan, had not, at the time the same was required to be altered, substantially and materially obstructed the free navigation of the said river; and that the same, if it had been completed according to said plan, would not have been a substantial and material obstruction to said navigation.

No change of circumstances, after passage of joint resolution of March 3, 1869.

3. That all the facts respecting said navigation and affecting the question of the probable amount of obstruction to the same by the construction of said bridge on said plan, were well known at the time of the passage of said joint resolution, and the said question was not affected by any facts coming to exist or be known subsequently thereto.

No judicial determination as to

4. That the assent given by said resolution was afterward withdrawn, without any judicial determina-

tion that said bridge had become or was about to become a substantial and material obstruction to the navigation aforesaid. fact of obstruction.

5. That by reason thereof the United States, according to principles of equity, has become and is liable to the complainant by force of the act aforesaid of March 3, 1871, to make good to it the amount of the actual and necessary cost and expenditures reasonably required to be incurred, and which have been incurred as hereinbefore set forth, in making the changes in said bridge and its approaches, as by the said act were authorized and required, in excess of the cost of building said bridge and approaches according to the plan proposed before the changes required were made. Plaintiffs entitled to relief, and prayer accordingly.

Wherefore, the complainant prays for relief.

To this bill a general demurrer was filed, which, after argument, was overruled, whereupon an answer was filed by the Government, in substance as follows: Demurrer of defendant to bill.

The Answer of the United States:

Admits the truth of the allegations in paragraphs one, two, three, four, and five of complainant's original bill; alleges that in October, 1868, the complainant proceeded to contract for the erection of a bridge, the span over the main channel to be three hundred feet long, and to be one hundred and three feet high above low water mark, and work was begun upon the same; that such a channel span was too short, and the bridge, if erected upon such a plan, would have been a serious

and dangerous obstruction to the navigation of the river; that persons interested therein remonstrated against the same, and applied to Congress to restrain and prohibit the construction of any channel span less than five hundred feet in length; the question and complaints were referred to committees for investigation, which heard the parties and witnesses, but the sole subject of controversy throughout such examination and the consideration of the subject by Congress, was as to the length of the channel span, the bridge company, by its agent, representing and affirming that the bridge was to be, and should be, of the height of one hundred and three feet in the said channel span; and it was upon that understanding, and on the faith of that representation, that Congress passed the joint resolution of March 3, 1869, imposing no other restriction upon the complainant than as to the length of the channel span of its bridge.

That, forthwith, upon the passage of the said resolution, the complainant did, in disregard of its said assurances as to the height of the channel span, proceed to change the plans of its bridge from a bridge of unbroken and continuous spans to a draw bridge, and from the height of channel span of one hundred and three feet to the height of seventy feet at low water, which was in bad faith and in violation of the understanding and assurances aforesaid.

That the act of March 3, 1871, was designed to enforce the understanding aforesaid, and to order and compel complainant to do what in equity and good faith it was bound to do, if it proceeded in the construction of its bridge, and to prevent it from inflicting

a great injury upon the public rights in the navigation of the Ohio river.

That the work upon said bridge in process of construction at the time of the passage of the said act of March 3, 1871, was being done in violation of the joint resolution of March 3, 1869, in this, to wit:

First, That the piers of said bridge were placed on a line varying twelve degrees from the line of the current of the river at low water mark, instead of parallel therewith, as required by the act of July 14, 1862.

Second, That thereby it reduced the channel of the main span practical for purposes of navigation to a width not exceeding three hundred and ninety feet, instead of four hundred feet in the clear, as required by the joint resolution of March 3, 1869: and in consequence of constructing the piers of the channel span with insufficient foundation, a large amount of rip-rap became and was necessary to secure and complete said piers, whereby a further reduction of the width of said channel span of not less than forty feet or more, would and must be made to complete said bridge upon the plan upon which it was being constructed.

That said bridge, as being erected at the time of the passage of the act of March 3, 1871, was and would have been a substantial and material obstruction to the navigation of the river.

The respondent denies each and every material allegation of the bill not expressly admitted. (Printed Record, pp. 20–22.

An amendment to the bill, was filed December 15, 1874 (Record, pp. 22, 23),

Which, striking from the original bill the clause (Record, p. 14) in paragraph 21, relating to the claim of G. A. Smith & Co., in lieu thereof, sets out that the sum of $206,658.53 had been incurred as an expenditure for masonry on account of work done and materials furnished by G. A. Smith & Co., as a part of the actual and necessary cost and expenditure reasonably required to be incurred in making the changes in said bridge and its approaches, as required by the act of Congress, making the whole amount of said cost and expenditures $557,450.48, being that much in excess of the cost of building said bridge and approaches according to the plan proposed before the changes required by said act to be done.

That of said sum of $206,648.53, the complainant, since filing the original bill, had paid to G. A. Smith & Co., $44,217.53, not included in any other items, leaving the complainant liable to G. A. Smith & Co. for the unpaid remainder of said sum, upon the contract between the parties, the particulars of which are set out and exhibited.

The Answer of the United States to this amendment (Record, p. 26),

Denies that complainant is indebted to G. A. Smith & Co., on account of work and labor done on said bridge as alleged in any sense whatever;

Denies that said indebtedness if incurred would have been a reasonable or necessary cost and expendi-

ture required to be incurred in making the required change;

Denies all other allegations of the amendment.

The answer further alleges,

That the claim of G. A. Smith & Co. for the said sum of $206,648.53, was the subject of a suit brought by them against the complainant, in which a portion of said claim was admitted to be due, being $50,782.47, for which, with interest, judgment was rendered April 18, 1873, without prejudice to the right to prosecute the same suit further for the recovery of the remainder in dispute; and that, afterward, on June 19, 1873, the said suit was settled by the parties, by an agreement, in pursuance of which the bridge company paid to G. A. Smith & Co. $95,000, of which $50,782.47 was paid in satisfaction of the judgment rendered, and $44,217.53 on account of the disputed portions of said claim, which sums it was agreed should be in full satisfaction of all claims of said Smith & Co. against the bridge company, unless the latter should recover from the United States, any excess beyond said sum of $44,217.53, on account of said claim, which excess, in that event, should belong to said Smith & Co., whereby it is claimed that the bridge company is under no liability to said Smith & Co. on account of said claim, and that the same is prosecuted by the bridge company for the use and benefit of said Smith & Co., and not for the use of the bridge company, and is not within the act of Congress authorizing this suit, except to the extent of said sum of $44,217.53.

General replication filed. (Record, p. 31.)

ARGUMENT.

The following questions are presented by the record of the cause, as thus set forth :

Jurisdiction; nature and principles of.

1. What is the nature of the *jurisdiction* of this Court in the case made by the bill? And upon what principles and by what rule must it be exercised?

Substantial compliance with existing law in building original bridge.

2. Whether the bridge, according to the plans on which it had progressed, at the time of the passage of the act of March 3, 1871, had been constructed so as *substantially* to comply with the provisions of law relating thereto?

Question of liability.

3. Whether there be any liability on the part of the United States to the complainant, by reason of the changes in said bridge, by the said act required to be made?

I.

THE NATURE OF THE JURISDICTION OF THE COURT—ITS PRINCIPLES AND RULE.

The jurisdiction of this Court in this cause is as complete and ample as an act of Congress can confer it.

The language of the act of March 3, 1871, is as follows :

Act of Congress, March 3, 1871.

"And in the event of the bridge company making the changes provided for in this act, it shall be lawful for said company, after they shall have made the changes in said bridge and the ap-

proaches thereto, as herein provided, to file their bill in equity against the United States in the Circuit Court of the United States for the Southern District of Ohio, and *full jurisdiction* is hereby conferred upon said Court to determine: FIRST, whether the bridge, according to the plans on which it has progressed, at the passage of this act, has been constructed so as *substantially* to comply with the provisions of law relating thereto; and SECOND, the *liability* of the United States, *if any there be*, to the said company, by reason of the changes by this act required to be made, and if the said Court shall determine that the United States is so liable, and that the said bridge was so being built, then the said Court shall further ascertain and determine the amount of the actual and necessary cost and expenditures reasonably required to be increased in making the changes in the said bridge and its approaches, as hereby authorized or required, in excess of the cost of building said bridge and approaches according to the plan proposed before the changes required by this act to be made. And the said Court is hereby further authorized and required to proceed therein to final decree, as in other cases in equity. And it shall be lawful for either party to the said suit to appeal from the final decree of the said Circuit Court to the Supreme Court of the United States, as in other cases, and the Supreme Court shall thereupon proceed to hear and determine the said case, and make a final decree therein; and thereupon, if such decree shall be in favor of said company, the secretary of the treasury of the United States shall, out of any moneys in the treasury not otherwise appropriated, pay to the said company such sum of money as shall, by the said Supreme Court, be so decreed to be paid to the said company; provided, nevertheless, that no money shall be paid by the secretary of the treasury to the said company until the Supreme Court of the United States, upon appeal taken as aforesaid, shall render a final decree in the case in favor of said company." U. S. Stat. at Large, Vol. XVI, p. 572.

It can not be denied that it is competent, under the constitution of the United States, for Congress to vest jurisdiction in the Federal Courts in such a case.

Constitutional grant of jurisdiction.

The capacity of the courts of the United States to receive a grant of jurisdiction extends, by the express language of the constitution, to "*controversies to which the United States shall be a party.*"

1. *Jurisdiction as to parties.*

This, it can not be denied, embraces cases in which the United States are *parties defendant* as well as *parties plaintiff.*

Beers v. Arkansas, 20 How. 529.

"It is an established principle of jurisprudence," says TANEY, C. J., in *Beers v. State of Arkansas*, 20 Howard, 529, "in all civilized nations that the sovereign can not be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and *permit itself to be made a defendant in a suit by individuals*, or by another state. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may happen that justice to the public requires it."

United States may consent to be sued.

The same principle applies to the Government of the United States.

It can not be sued for a claim or demand against it without its consent.

"This rule is carried so far by this Court, that it has been held that when the United States is plaintiff in one of the federal courts, and the defendant has pleaded a set-off, which the acts of Congress have authorized him to rely on, no judgment can be rendered against the Government, although it may be judicially ascertained that, on striking a balance of just demands, the government is indebted to the defendant in an ascertained amount. And if the United States shall sue an individual in any of the Courts, and fail to establish a claim, no judgment can be rendered

for the costs expended by the defendant in his defense." *De Groot* v. *The United States*, 5 Wall. 431. *De Groot v. U. S.*, 5 Wall. 531.

So that the Court of Claims having the right to entertain jurisdiction of cases in which the United States is defendant, and to render judgment against it, acquires its jurisdiction only by virtue of acts of Congress, and it is limited precisely to such cases, both in regard to parties and to the cause of action, as Congress has prescribed; and no reason can be perceived why Congress may not at any time withdraw a particular case from the cognizance of that Court, or prescribe in such case the circumstances under which alone the Court may render a judgment against the Government. *Ibid.*

United States v. *Eckford*, 6 Wall. 484.
The Siren, 7 Wall. 152.
The Davis, 10 Wall. 15.
Case v. *Terrell*, 11 Wall. 199.

"As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress or the Court can not exercise jurisdiction over it." *United States* v. *Clarke*, 8 Peters, 443. *U. S.* v. *Clarke*, 8 Peters, 443

Nevertheless acts of Congress passed, for the purpose of enabling a private person to prosecute judicially a claim against the United States, ought not to be interpreted with a narrow view of the legislative intention and to give substantial effect to technical defenses. *Cross* v. *The United States*, 14 Wall. 483. *Cross* v. *U. S.*, 14 Wall. 483.

Such is the spirit of the common law in the analogous proceeding of a petition of right. In *Baron De Bode's case*, 8 Ad. & Ell. N. S. 274, Lord DENMAN, in answer to the objection made on behalf of the crown *Baron de Bode's Case*, 8 Ad. & Ell. N. S. 274.

that a petition of right could not be maintained for the recovery of a decree of money claimed either as a debt or by way of damages, said:

"We may here observe that there is nothing to secure the crown against committing the same species of wrong, unconscious and involuntary wrong, in respect of money, which founds the subject's right to sue out his petition when committed in respect to lands or specific chattels; and there is an unconquerable repugnance to the suggestion that the door ought to be closed against all redress or remedy for such wrong. The reference from the crown to the law officers, and that of the law officers to the chancellor, would seem to reject the ordinary rules and analogies of legal proceedings in order to arrive at the conclusion, whether the subject's right has been in any manner infringed by the crown, and to show that if the infraction is duly proved, reparation ought to be made. The dignity of the crown itself appears to demand that when the inquiry which it has enjoined is so terminated, the proper cause for giving effect to its sacred and more important injunction—*that right be done*—should be pursued. For this reason, without coming to any decision on matters which may be called technical, we feel it to be our duty to examine in the first place whether the facts found by the jury establish the right supposing for the present that this remedy is given by our laws."

The proceeding by which citizen or subject is protected in his right against the sovereign form of government is not an anomaly. On the contrary, it is given as of right, and not of grace, by almost every system of civilized jurisprudence.

Brown v. *U. S.*, 6 Ct. Cl. 171.

"The laws of other nations have been produced and proved in this Court," says Judge NOTT, in the case of *Brown* v. *The United States* 6 Ct. Cl. Rep. 171, "and the mortifying fact is judicially established that the Government of the United States holds itself, of nearly all governments, the least amenable to the law. First in the high civilization that protects the individual

and assures his rights stands the great empire of the German States. 'The state,' says a lawyer, also distinguished as a writer, who was examined as a witness in the court, 'represented in its pecuniary capacity as the representative of mercy and property affairs, is called the *fiscus*. For the purpose of maintaining suits against the government, the *fiscus* stands in the place of the government; for the purpose of compelling the payment of demands against the state, the *fiscus* is substituted for the state itself. I know of no restriction of the rights of the subjects of Prussia to maintain any suit against the *fiscus;* foreigners as well as subjects, any man, can sue the *fiscus;* the power to maintain a suit against the *fiscus* is a matter of absolute right. Suits in relation to state property, in which the *fiscus* is either plaintiff or defendant, are heard and decided like suits among private parties, and all the consequences of defaults and executions takes place against the *fiscus*. The *fiscus* is brought into court by the service of summons and complaint upon the fiscal attorney. The fiscal attorney to answer just like any other party and bring his proof. Judgments rendered against the *fiscus* may be satisfied and discharged in the usual way, by execution.' *Brown's case*, 5 Ct. Cl. R. 271. In Hanover and Bavaria, the redress is substantially the same. *Mullin's case*, 6 Id. In the republic of Switzerland the 'federal tribunal takes cognizance of suits between the confederation on the one side and corporations or individuals on the other, when these corporations or private citizens are complainants and the object of litigation is of the value of at least 3,000 francs.' Law, 5th June, 1849; *Lobsiger's case*, 5 Ct. Cl. R. 687. In Holland, the Netherlands, the Hanseatic Provinces, the free city of Hamburg, and probably in all countries which have inherited the perfected justice of the civil law, the government is in legal liability thus subject to the citizen. Even in France, under the late empire, there was a less circumscribed means of redress, a more certain judicial remedy, a more effective method of enforcing the judgment recovered, than has been given to the American citizen, notwithstanding the pledge of the constitution. Of all the governments of Europe, it is believed that Russia alone does not hold the state amenable in matters of property

to the law. Of all the countries whose laws have been examined in this Court, Spain only resembles the United States in fettering the judicial proceedings of her courts by restrictions and leaving the execution of their decrees depending upon the legislative will. Yet even in Spain, we know historically, back in the time of Ferdinand and Isabella, that the son of Columbus 'did not succeed to his father's dignities till he had obtained a judgment in his favor against the crown form the Council of the Indias; an act,' adds Prescott, 'highly honorable to that tribunal, and showing that the independence of the courts of justice, the greatest bulwarks of civil liberty, was well maintained under King Ferdinand.' *Ferd. and Isabella*, 3 vol., p. 245. The records of this Court also show that within the present century an American citizen recovered a judgment against Spain, in a Spanish tribunal, to the very large amount of $373,870.88, and that he elected to retain Spain as his debtor when the decree was about to be transferred to and assumed by the United States, and that his choice was judicious, for, though thus transferred and assumed, the debt has never been paid." *Meade's case*, 2 Ct. Cl. R. 225.

Chisholm's Ex'r v. Georgia, 2 Dall. 478.

It was in this spirit and love of justice that Chief Justice JAY, in the case of *Chisholm's Ex'rs* v. *Georgia*, 2 Dall. 478, said:

"I wish the state of society was so far improved and the science of government advanced to such a degree of perfection as that the whole nation could, in the peaceable course of law, be compelled to do justice and be sued by individual citizens."

Story on Const., §§ 1677, 1678.
Curtis' Com. on Const., §§ 57-100.

Sergeant MANNING cited *Pawlett* v. *Attorney-General*, Hardres, 465, in *De Bode* v. *The Queen*, 3 House of Lords Cas. 459, "as an authority to show that the crown can not do acts which are against natural equity, without the law affording some remedy."

2. *Jurisdiction as to subject-matter.*

The jurisdiction of the Court in this case being established so far as *the question of parties* is concerned, the next branch of the inquiry is, does it embrace the *subject-matter?*

It is a *controversy* to which the United States is a party; and so *literally* fulfills the terms of the constitutional grant of jurisdiction. But the constitutional and essential quality of all power in the courts of the United States, is, that it must be *judicial.* Their jurisdiction can not be lawfully invoked except for the determination of *judicial questions.* *Hayburn's case,* 2 Dall. 409.

U. S. v. *Ferreira,* 13 How. 40, and note.

The rule is laid down by the Supreme Court of the United States, in the case of *Murray's Lessee* v. *Hoboken Land and Improvement Co.,* 18 How. 284, as follows:

Murray's Lessee v. *Hoboken Land & Imp. Co.,* 18 How. 284.

"To avoid misconstruction upon so grave a subject we think it proper to state that we do not consider Congress can *either withdraw from judicial cognizance,* any matter, which from its nature, is the subject of a suit at common law, or in equity, or admiralty, nor, on the other hand, *can it bring under the judicial power* a matter which, from its nature, is not a subject for judicial determination. *At the same time, there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them,* and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States as it may deem proper."

What questions necessarily arise in the case stated in the bill, which may not be presented in such form that the judicial power is capable of acting on them?

The question whether the complainant's bridge, so

far as its construction had progressed, conformed to the laws relating to it, is altogether a judicial one.

The complainant claims that it had acquired vested rights of property in that bridge, according to the terms of the joint resolution of March 3, 1869; and that Congress in subsequently withdrawing its assent, under the circumstances, as stated in the bill, violated the terms of the contract between the United States and the plaintiff, contained in the joint resolution, took the plaintiff's property for a public use, without compensation, and punished the plaintiff by a deprivation of a beneficial use and enjoyment of its property, for an offense created by an *ex post facto* law.

The very statement of these claims shows that the controversy, of which they form the subject, is *judicial in its nature.*

Marbury v. Madison, 1 Cr. 162.

In *Marbury* v. *Madison*, 1 Cranch, 162, C. J. MARSHALL uttered the famous saying:

"The Government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested right."

In that case, it was held that, "as the law creating the office gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights which are protected by the laws of his country."

"The question whether a right has vested or not, is, *in its nature judicial*, and *must be tried by the judicial authority*."

So, we claim, conversely, if a right has once vested, the question whether it has been rightfully divested, is equally a question at least susceptible, if submitted in form, of judicial determination.

It may, on the other hand, be urged that the prohibitions contained in the act of March 3, 1871, which form the ground of this suit, are regulations of interstate commerce, made by Congress in the exercise of a constitutional and sovereign power, in respect to which it can not be questioned, and that consequently the subject-matter of the controversy is of a *political* and not a *judicial* nature.

In the case of *Rhode Island* v. *Massachusetts*, 12 Peters, 736, it had been objected to the jurisdiction of the Court, that the question involved was political in its nature, and could not be made judicial. It was decided that as the constitution conferred upon the Court jurisdiction to decide "controversies between States," that this included "all" controversies between them, and the submission of them to judicial decision made them judicial questions.

Rhode Island v. *Massachusetts*, 12 Peters, 736.

BALDWIN, J., said: "We are thus pointed to the true boundary line between political and judicial power and questions. A sovereign decides by his own will, which is the supreme law within his own boundary (6 Peters, 714; 9 Peters, 748); a court or judge decides according to the law prescribed by the sovereign power, and that law is the rule for judgment. The submission by the sovereigns or states, to a court of law or equity of a controversy between them, without prescribing any rule of decision, gives power to decide according to the appropriate law of the case (11 Ves. 294), which depends on the subject-matter, the source and nature of the claims of the parties and the law which governs them. From the time of such submission, the question ceases to be a political one, to be decided by the *sic volo, sic jubeo*, of political power, it comes to the court to be decided by its judgment, legal discretion and solemn consideration of the rules of law appropriate to its nature as a judicial question, depending on the exercise of judicial power, as it is bound to act by known

and settled principles of national or municipal jurisprudence as the case requires. . . .

"These considerations lead to the definition of political and judicial power and questions; the former is that which a sovereign or state exerts by his or its own authority, as reprisal or confiscation (3 Ves. 429); the latter is that which is granted to a court or judicial tribunal. So of controversies between states; they are in their nature political, when the sovereign or state reserves to itself the right of deciding on it; makes it the 'subject of a treaty to be settled as between states independent,' or 'the foundation of representations from state to state.' This is political equity, to be adjudged by the parties themselves, as contradistinguished from judicial equity, administered by a court of justice decreeing the *equum et bonum* of the code, let who or what be the parties before them. These are the definitions of law as made in the great Maryland case of *Barclay* v. *Russell*, 3 Ves. 435, as they have long been settled and established." *Vide* 1 Ves. 371, 387; 2 Ves., jr., 56, 60; Hob. 113; *Columbian Gov't* v. *Rothschild*, 1 Lim. 194; *King of Spain* v. *Machado*, 4 Russ. 560; 2 Bligh. P. C. N. S. 31; *Follett* v. *Ogden*, 3 D. & E. 730; *Cohens* v. *Virginia*, 6 Wheat. 378.

Thus it may well be that a question may be *political* in one aspect; in another, *judicial.*

This principal has been signally illustrated by the decisions of the Supreme Court of the United States, in cases involving the interpretation of the treaty with Spain for the cession of Florida in 1819:

"When the construction of this treaty was under the consideration of the Court in the case of *Foster and Elam* v. *Neilson*, 2 Pet. 254, 299," says the Supreme Court in deciding the case of *The United States* v. *Arredondo et al.*, 6 Pet. 710, "it was under very different circumstances. The plaintiff claimed a title to the land in controversy under a Spanish grant prior to the treaty, which he alleged was confirmed by the eighth article; he stood simply on his right, without any act of Congress authorizing the

U. S. v. *Arredondo*, 6 Peters, 710.

suit or conferring on the Court any extraordinary powers. The first question which was decisive of the plaintiff's pretenses, was whether the lands in contest were within the boundaries of Louisiana as ceded in 1803, or within Florida as ceded in 1819. The boundary between the two territories had been for many years the subject of controversy and negotiation between the American and Spanish governments, the one claiming that Louisiana extended eastward of the Mississippi to the Perdido, the other that it did not extend on that side of the river beyond the island of Orleans, alleged to be separated from West Florida by the Iberville. To have decided in favor of the plaintiff would have been adopting the Spanish construction of the Louisiana treaty in opposition to the pretensions and course of this Government, which had taken possession of, and exercised the powers of government over, the territory between the Mississippi and the Perdido.

"This Court did not deem the settlement of boundaries a *judicial*, but a *political* question; that it was not its duty to lead, but to follow the action of the other departments of the Government; that when individual rights depended on national boundaries, 'the judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided, and its duty commonly is to decide upon individual rights according to those principles which the political departments of the nation have established.' 'If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous.' 'We think, then, however individual judges might construe the treaty of St. Ildefonso, it is the province of the Court to conform its decisions to the will of the legislature, if that will has been clearly expressed.' 2 Peters, 307. As to the other question, depending on the stipulations of the eighth article, the Court declared: 'And the legislature must execute the contract before it can become a rule for the Court.' 2 Pet. 314.

"But this case assumes a very different aspect. The only question depending is, whether the claimants or the United States are the owners of the land in question. *By consenting to be sued and submitting the decision to judicial action, they have considered it as a purely judicial question, which we are now*

bound to decide as between man and man, on the same subject-matter and by the rules which Congress themselves have prescribed, of which the stipulations of any treaty and the proceedings under the same form one of four distinctions."

If the objection founded on the necessary political character of every act of a supreme government should prevail in every case where it is drawn into controversy, it would render suits against such a government, though with its consent, vain and impossible; for such a sovereign imparts the *political quality* to every act which it can perform, and of course to every question into which the consideration of its conduct enters.

The doctrine on which the objection rests finds no sanction in reason or authority. The contrary doctrine is explicitly asserted in the case of *Brent* v. *Bank of Washington*, 10 Peters, 614. It is there said by the Supreme Court:

Brent v. *Bank of Washington*, 10 Peters, 614.

"This Court, in *Mitchell* v. *The United States*, 9 Peters, 743, have recognized the principle in the common law, that though the law gives the king a better or more convenient *remedy*, he has no better *right* in court than the subject through whom the property claimed comes to his hands. 2 Co. Inst. 573; 2 Ves., sr. 296; Hard. 60, 460. This principle is also carried into all the statutes by which the appropriate courts are authorized to decide and under which they do decide on the rights of a subject in a controversy with the king, *according to equity and good conscience* between subject and subject." 7 Co. 19*b*; Hard. 27, 170, 230, 502; 5 Co. Inst. 190.

Fletcher v. *Peck*, 6 Cr. 135.

Chief Justice MARSHALL, in *Fletcher* v. *Peck*, 6 Cranch, 135, put the case of the present objection as a *reductio ad absurdum*. He says:

"The constitution, as passed, gave the courts of the United States jurisdiction in suits brought against individual states. A

state, then, which violated its own contract was suable in the courts of the United States for that violation. Would it have been a defense in such a suit to say that the state had passed a law absolving itself from the contract? It is scarcely to be conceived that such a defense could be set up."

The essence of the objection is that a sovereign can not become bound by an obligation; yet nothing is better settled by repeated adjudications of the Supreme Court of the United States than this, that a state may bind itself by contract in the exercise of its political powers.

Humphrey v. *Pegues*, 16 Wall. 249.

Wilmington Railroad v. *Reid*, 13 Wall. 264.

And the rule is stated by Justice SWAYNE in *Davis* v. *Gray*, 16 Wall. 232, as follows: *Davis v. Gray*, 16 Wall. 232.

"When a state becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances. *When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty.*" *Curran* v. *State of Arkansas*, 15 How. 308.

The fact that one of the parties is a political body, a government exercising sovereign power, may have some significance in giving character to the transaction, and is therefore a circumstance to be taken into account; as in *The United States* v. *The Bank of the United States*, 5 How. 394, it was decided that an instrument, though in the form of a bill of exchange drawn by one government upon another, is not governed by the law merchant. Nevertheless, it is also held that *U. S.* v. *Bank of U S.*, 5 How. 394.

"whenever the Government of the United States, through its

lawfully authorized agents, becomes the holder of a bill of exchange, it is bound to use the same diligence, in order to charge the indorser, as in a transaction between individuals" (*United States* v. *Barker's Adm'x*, 12 Wheat. 559); that "when the United States, by its authorized officer, become a party to negotiable paper, they have all the responsibility of individuals who are parties to such instruments. We know of no difference, except that the United States can not be sued" (*United States* v. *Bank of Metropolis*, 15 Pet. 392); "that it must be taken as settled that when the United States becomes a party to what is called commercial paper—by which is meant that class of paper which is transferable by indorsement or delivery and between private parties, is exempt in the hands of innocent holders from inquiry into the circumstances under which it was put into circulation—they are bound in any court to whose jurisdiction they submit by the same principles that govern individuals in their relations to such paper." *The Floyd Acceptances*, 7 Wall. 675.

The Siren, 7 Wall. 152.

And it was said, in the case of *The Siren*, 7 Wall. 152, that,

"although for reasons of public policy, a claim for damages against a vessel of the United States, guilty of a maritime tort, can not be enforced by direct proceedings against the vessel, yet it will be enforced by the courts whenever the property itself, upon which the claim exists, becomes, through the affirmative action of the United States, subject to their jurisdiction and control. The Government, in such a case, stands, with reference to the rights of the defendants or claimants, as do private suitors, except that it is exempt from costs and affirmative relief against it, beyond the demand or property in controversy." *U. S.* v. *Clarke*, 8 Pet. 444; *U. S.* v. *Ringgold*, 8 Pet. 150; *U. S.* v. *McDaniel*, 7 Pet. 16.

It is perhaps in part due to this principle, that it has always been held that the Government is not liable for the unauthorized acts of its officers, their acts be-

ing in themselves torts; nor affected by their laches, however gross.

United States v. *Kirkpatrick*, 9 Wheat. 720.
Dix v. *Postmaster-General*, 1 Peters, 318.
Nichols v. *U. S.*, 7 Wall. 122.
Gibbons v. *U. S.*, 8 Wall. 274.

No standard of liability established in the act.

But it may be argued that the jurisdiction in this case, otherwise complete as to the parties, and unobjectionable in regard to the subject-matter, must, nevertheless, fail, because the act of Congress authorizing the institution of the suit and referring to the court the question of the liability of the United States, has failed to provide any guide or standard of judgment; that no such standard can be found in any pre-existing statute, the government being the representative of the sovereign, and not subject to the laws; that the rule of liability can not be found in the constitution of the United States, which *is* a law to the Government and limits its powers because if the act complained of was justified by that charter of powers and rights, then there can be no wrong in contemplation of law, and consequently no liability to make compensation; if, on the other hand, the legislative acts under which the facts have arisen which constitute the cause of action, were not warranted by the constitution, but are in violation of its provisions and of the rights secured thereby, then that legislative action is void, and no liability can accrue against the Government of the United States for that reason, the right of action, if any, being against its officers and agents, if they have, under a void authority, trespassed upon the complainant's rights; that,

were it otherwise, there is no *lex non scripta* or common law in the national jurisprudence which can be resorted to, to supply maxims or principles for the exercise of such a jurisdiction.

No technical legal liability.

Austin, Jur., I, 225, 233.

It is, of course, admitted that the liability sought to be enforced in this suit against the United States is not a *technical legal liability*; for, as Mr. AUSTIN in his Province of Jurisprudence Determined (vol. 1, pp. 225, 233) has abundantly shown, the power of a sovereign is incapable of legal limitation, and he can therefore have neither *legal* rights nor rest under *legal* obligations, on which ground he defends the paradox of Hobbes, that "no law can be unjust," by showing that *justice and injustice* can not be predicated of *law* in its only true and technical sense, as the command of a sovereign power, because there is nothing higher with which it can be compared; although it may be so styled *metaphorically* by virtue of a comparison with a standard based on the dictates of a *positive morality*. And he shows (p. 261) that although a sovereign government may appear in the character of a defendant before a tribunal of its own appointment, and deriving jurisdiction from itself, it is not to be inferred that it lies under *legal duties* to its own subjects, for on that supposition it would be both sovereign and not sovereign at the same time. Hence he says (p. 262):

"The rights which are pursued against it before tribunals of its own and also the rights which it pursues before tribunals of its own, are merely *analogous* to legal rights (in the proper acceptation of the term); or (borrowing the brief and commodious expressions by which the Roman jurists commonly denote an analogy) they are legal rights *quasi*, or legal rights *uti*. The

rights which are pursued against it before tribunals of its own, it may extinguish by its own authority. But, this notwithstanding, it permits the demandants to prosecute their claims; and it yields to those claims, when they are established judicially, *as if* they were truly founded on positive laws set to itself by a third and distinct party."

Consent to be sued, an admission of a standard of judgment.

It is, nevertheless, clear, that as long as the Government continues its permission to the plaintiff to prosecute his action against it, it can not consistently and logically set up as a defense that there is no means by which to reach a decision. The authority to bring and prosecute the suit carries with it a conclusive admission that a rule and standard of judgment does exist; and in the absence of such a rule, expressly prescribed, the law authorizing the suit, by necessary implication, is a command to the Court to ascertain for itself the true *ratio decidendi*.

Goudsmit's Pandects, by Gould, 242.

Such is the principle declared by the civil law, as expounded by a recent writer (The Pandects, by J. E. Gondsmit, translated by R. De Tracy Gould, pp. 242, 243), to this effect:

"The faculty of having recourse to the means of compulsion necessary to its protection and its maintenance, is, of *the nature*, if not of *the substance*, of all right. Consequently, from the moment that the law, or some other source of right, recognizes a right, this right, in the absence of some express provision to the contrary, is susceptible of being prosecuted before the judge; and, reciprocally, from the moment that an action is permitted, it implies the recognition of a right which seeks to enforce itself by this means; moreover, the action is not a distinct right, having a separate existence; it is the very principle of right, which, feeling itself attacked, arms itself for the struggle. In other words, it is the *right in action*. Yet as every action is directed against a particular person, from whom it demands the reparation of a

wrong or an injustice, the right of suit assumes a relative, personal and obligatory character, by reason of which, it establishes between the plaintiff and the defendant a relation of creditor and debtor." To this, the author cites from a German commentator, Unger, § 113, note 13, as follows: "The right of action is, in some sort, right on a *war footing*—right clad in the *sagum*—as opposed to right in a state of peace—right clothed with the *toga*, . . . Since, finally, it is right itself which goes to war (*res in judicium deducta*), and that the *right of action* is, in truth, *a right* of *the right*."

What is the rule of decision.

If then, *ex necessitate rei*, it must be assumed that there is some ascertainable rule of decision in the case, and the Court itself is invested with authority to ascertain and declare it, what is it and where shall it be found?

Gibbons v. *U. S.*, 8 Wall. 274.

In *Gibbons* v. *The United States*, 8 Wall. 274, the Supreme Court say that "in the exercise of this unaccustomed jurisdiction, the courts are embarrassed by the necessary absence of precedent and settled principles by which the liability of the Government my be determined"—an expression, however, which, while conceding the difficulty, also seems to declare that it is not insurmountable.

The difficulty would seem to be increased, by a consideration of what was said in *Wheaton* v. *Peters*, 8 Peters, 658, that:

Wheaton v. *Peters*, 8 Peters, 658.

"It is clear there can be no common law of the United States. The Federal Government is composed of twenty-four* sovereign and independent states; each of which may have its local usages, customs, and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the constitution or law of the Union. The common law could be made a part of our federal system only by legislative adoption."

* 1834.

Yet the Federal Courts sit in each state to administer its laws, and adjudicate upon rights accruing under them; and it is their doctrine that, while they follow the decisions of state tribunals upon questions of local application, or where they have fixed a rule of property, yet, upon those based upon principles common to the general system of jurisprudence which is supposed to prevail in all the states, they adopt their own independent conclusions, and administer what they seek to maintain as a general and uniform system. In the *Wheeling Bridge case*, 13 Howard, 563, the Court, by Justice McLean, commenting on the very objection, "that there is no abstract pervading principle of the common law of the Union," under which the Court could take jurisdiction, based on the citation from *Wheaton* v. *Peters*, 8 Pet. 658, cites from *Robinson* v. *Campbell*, 3 Wheat. 222, a statement of the doctrine that "to effectuate the purposes of the legislature, the *remedies* in the courts of the United States are to be, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity as distinguished and defined in that country from which we derive our knowledge of their principles"—the very principle of equity being to supply that wherein the common law is deficient—that "*superior justice*," as Lord Chancellor Selborne calls it in *W. & W. Ry. Co.* v. *L. & W. N. Ry. Co.*, L. R., 16 Eq. 439.

Olcott v. *The Supervisors*. 16 Wall. 678.

That law, common to all the local systems of jurisprudence, known in all the states, which are the offspring of English colonization, is described by Chancel-

lor KENT (2 Com. 471), as quoted by THOMPSON, J., in *Wheaton* v. *Peters*, 8 Peters, 669:

"The common law includes those principles, usages, and rules of action applicable to the government and security of the person and property which do not rest for their authority upon any express and positive declaration of the will of the legislature. A great proportion of the rules and maxims which constitute the immense code of the common law, grew into use by gradual adoption, and received from time to time the sanction of the courts of justice, without any legislative act or interference. It was the application of the dictates of natural justice and of cultivated reason to particular cases."

It is to this source of right that the Supreme Court refer in the case of *United States* v. *Arredondo et al.*, 6 Peters, 716, when they say:

"We are also required to finally decide 'all other questions properly arising between the claimant and the United States. There is but one which has arisen in the case which does not refer to the law of nations, the treaty and proceedings under it, the acts of Congress, or the laws of Spain—that is, the question of fraud in making the grant, which is the foundation of the plaintiff's title; which, as well as all others, we must, by the terms of the law, decide 'in conformity to the principles of justice.' We know of no surer guides to the principles of justice than the rules of the common law, administered under a special law, which dictates (section second) 'that every petition which shall be presented under the provision of this act, shall be conducted according to the rules of a court of equity,' and it does not become this tribunal to acknowledge that the decisions of any other are to be deemed better evidence of those rules or the principles of justice."

HENRI AHRENS, lately professor in the University of Leipsic, in his Droit Naturel, Vol. I., p. 98, 6me

edition, Leipsic, 1868, has the passage, of which the following is a translation:

"Every system of positive law, however perfect, reveals omissions, obscurities, and defects of decision for unforseen cases; and as the judge ought to have the means of deciding in every case that may be presented, *the law of nature* may become an auxiliary source of judgment. It would not, indeed, be permissible for him to decide a case against the letter of the written law; for that would be to take from the law its general and uniform character, and put every thing at the mercy of the personal and variable views of the judge; but *when the law is silent, the conscience and reason of judges must speak;* and the opinions which they derive from a study of the philosophy of law then become grounds of decision. This truth has appeared so evident that many systems of law (among others the Austrian Code, § 7) have recognized expressly the law of nature as a subsidiary source of positive law." *

EDMUND BURKE went further than this. He said:

"It would be hard to point out any error more truly subversive of all the order and beauty, of all the peace and happines of human society, than the position that any body of men have a right to make what laws they please, or that laws can derive any authority whatever from their institution merely, and independent of the quality of their subject-matter. . . . All human laws are, properly speaking, only declaratory. They may alter the

* "Chaque legislation positive, quelque parfaite qu'elle soit, offre des lacunes, des obscurities, ou des defauts de decision pour des cas non prevus; et comme le juge doit posséder un moyen de prononcer dans tous les cas qui se presentent, le droit naturel peut alors devenir pour lui, une source subsidiaire. Certes, il n'est pas permis de décider un cas contre la lettre de la loi ecrite; car ce serait ótera la loi son character général et uniform et mettre tout a la merci des vues personnelles et variable du juge; mais quand la loi se tait, la conscience et la raison des juges doivent parler, et les opinions qu'ils se sont formées par l'étude de la philosophie du droit deviennent alors des motifs de decision. Cette verite a paru si evidente, que plusieurs legislations (entre autres le Code Autrichien, § 7) out reconnue expressement le droit naturel comme une source subsidiaire du droit positif."

mode and application, but have no power over the substance of original justice." Tracts on the Popery Laws, cap. III., pt. I.

Professor Lorimer.

In the same sense, Professor LORIMER, of the University of Edinburgh, in an introductory lecture, in 1868, on the Study of Jurisprudence as a Science (p. 10), concludes, from a consideration of the connection between positive and natural law, that "all positive law that is not mere error is the local and temporal embodment, more or less complete, of natural law, more or less known."

Savigny, Le Droit des Obligations.

Savigny, with great acuteness, in his Le Droit des Obligations (French translation by Gerardin et Jogon, Vol. I., p. 47 et seq.), discusses the foundation and distinction in the civil law of obligations.

He distinguishes obligations as *civiles* and *naturales;* the former *enforceable by action*, the latter *not*.

When obligations, originating in the *jus gentium*, are recognized by the *jus civile*, that recognition consists in providing an action as a remedy for a breach.

When obligations are not recognized by the *jus civile*, it is by not providing such an action.

The *obligatio naturalis*, however, though not directly enforceable by action, may give rise to valid juridical effects, and may be indirectly enforced in cases where it can be made the subject of judicial consideration, otherwise than by a direct action.

Of these instances the Roman law furnished several classes :

1. *Solutum non repetere.* When one pays what he believes to be an enforceable debt, but is mistaken, the debt being not enforceable, but payable only *in foro conscientiæ*, can not recover back the payment.

2. *Compensation or set-off.* A claim not enforceable by suit may be the subject of a set-off or recoupment.

3. *Deductio ex peculio.* Debts due between father and son, or master and slave, non-enforceable by suit, settled themselves by cancellation, out of the *peculium.*

4. *Caution, constitutio, jus hypothecarius,* and *novatio* might severally exist when the principal or original obligation was not enforceable.

Non-enforceable natural obligations owe their characteristic, either to the nature of their origin or to some subsequent event, and may be divided into four classes:

1. Those which arise from a want of some form, rendered necessary by positive law; *e. g.*, in our law such would be contracts, not enforceable by reason of not conforming to the statute of frauds.

2. Those arising from a want of juridical relations between the parties, capable of giving rise to enforceable obligations.

Of these, suits against the sovereign would be an example.

3. Where obligations rest upon equitable exceptions from strict consequences of positive law.

As in cases of *subrogation,* when the act which gives rise to the *equity* has extinguished the *legal* right.

4. When the legal obligation has been extinguished by the operation of some positive rule of law:

As by discharge in bankruptcy, statute of limitations, etc.

Our own law regards all obligations of this character, though not strictly *legal,* because not *enforceable,* yet as something more than mere *moral obligations;* for the law gives to them a significance which it does not

accord to the latter; as, for example, it recognizes them as *valuable considerations*, which are sufficient to support a new promise to discharge them.

Moral obligation sufficient.

But a moral obligation is sufficient. If that can be established, it becomes a legal obligation by being clothed with this legal, statutory remedy.

Sir Hugh Cairns.

Sir HUGH CAIRNS, in arguing the case of the *Florida bonds* (Proc. of Conv. of 1853, pp. 246, 273, cited 6 Am. Law Rev. 401), urged, as his strongest point, that, under all the circumstances of the case, the United States were morally bound to pay their debts.

"A moral obligation," says he, "is as high a claim as can be set up against a sovereign power, and is as fully obligatory against such a power as a legal obligation. *A moral obligation is the only claim that can exist against a sovereign state.*"

Rhode Island v. *Massachusetts*, 14 Pet. 225. Mr. Austin, *arguendo.*

As was said by Mr. AUSTIN, then attorney-general of Massachusets, in arguing the case of *Rhode Island* v. *Massachusetts*, 14 Peters, 225, with as much eloquence as force and truth:

"In a case where 'the file affords no precedent,' and there is neither common nor statute law to guide the proceedings of the Court, the counsel for the respondent respectfully contends that the case brings with it, into this tribunal, *its own law*, in the principles of an elevated and perfect justice, unfettered—as in their nature they are incapable of being fettered—by technical subtleties and petty forms."

Actio bonæ fidei.

The suit we bring, in the nomenclature of the Roman law, might be called *actio bonae fidei*, and stands on the foundation of natural justice. The rule of decision, that appropriately belongs to it, is stated by Cicero in his oration in defense of Roscius (§ 30, I. l.):

"*In bonae fidei judiciis libera potestas permitti videtur*

judici ex æquo et bono æstimandi quantum actori restitui debeat." Pandects, Goudsmit by Gould, 260, § 93, F.

It may be said that the United States can not be held to be liable in this case in any event, because if its act in declaring the complainant's bridge an unlawful structure, and forbidding its completion, except upon a modified plan, was a lawful exercise of power, no legal rights were violated; and on the other hand, if its act in the particulars mentioned was illegal, then there was no duty of obedience or compliance. The bridge company was under no obligation to regard it. It might lawfully have proceeded to the completion of its structure and to use it as contemplated in its charter. If any individuals, whether private persons or professing to act under color of authority, as officers or agents of the Government of the United States, attempted to interfere with its occupancy and use, or to abate the bridge as a nuisance, appropriate remedies might have been found to prevent their threatened tresspasses, or for compensation, if their violence proved too great for successful resistance. And that in such case, of the unauthorized act even of a public officer or agent acting in the name and on behalf of the Government, the United States could not be held responsible for such torts.

In the absence of legislation authorizing a suit against the Government for such a cause, no doubt the law would be so declared, as it was in *Langford* v. *The United States*, 101 U. S. 341, citing and confirming *Nichols* v. *The United States*, 7 Wall. 122, and *Gibbons* v. *The United States*, 8 Wall. 269.

But the very object of giving legislative authority for the present suit was to obviate that difficulty.

It was open to the bridge company to complete their bridge according to the original plan, notwithstanding Congress in the meantime had withdrawn its assent to the structure as proposed.

Had they done so, it could have been abated only on a judicial declaration that it was a public nuisance, injurious to private interests by obstructing the navigation of the river. If individuals had abated it on that ground, they would have been liable in damages, unless they could have established that defense. The act of Congress authorizing the present suit, if it means any thing, at least means this: That if, in such case, the officers and agents of the Government proceeding to abate such a bridge would be liable in damages, on the ground that the bridge was not an unlawful obstruction to navigation, the United States, by permitting itself to be sued for what amounts to an abatement, means to subject itself to a similar rule of recovery, unless it can escape liability by the establishment of the same defense.

The case of *Langford* v. *The United States*, *supra*, declares that the maxim of English constitutional law, that the King can do no wrong, is one that has no place in our system of government. The conclusion is necessary, that where, for a tort committed under color of its authority, the individuals guilty of its commission would be civilly liable, the United States becomes so by assuming responsibility for their acts, and authorizing a suit to be brought against the Government in their stead.

The bridge company gave up their right to contest the question whether their bridge would or would not

be adjudged to be a nuisance, and gave up their right to prevent its abatement by process of injunction against whomsoever, acting under color of authority or otherwise, should attempt to abate it, and gave up the right of action they would have had against any, who, choosing to abate it, by force, might have been held liable as trespassers; and these concessions, of acknowledged legal rights, constitute the conditions on which the right to institute and prosecute the present suit was granted, and furnish the consideration for the liability of the United States, which is its foundation, raising by implication the promise of indemnity, according to the rule of damages prescribed, if upon principles of equal justice, compensation ought to be made.

Under this head, then, it is claimed:

1. That this Court has jurisdiction in this cause, of the parties, by the express terms of the act of Congress which authorized the bringing of the suit.

2. That this jurisdiction is not excluded by the nature of the controversy.

3. And that it does not fail for want of a rule of decision.

II.

LAWFULNESS OF THE BRIDGE AS ORIGINALLY BUILT.

The act of March 3, 1871, which anthorizes the suit, prescribes certain conditions to be performed before the right to sue shall accrue.

They were that the changes required by the act to

be made in the original plan of the bridge, approved by the secretary of war, should be completely made before the right to file the bill should arise.

The bill avers specifically performance on the part of the complainant of all these conditions. Although this averment is not admitted by the answer, it is clearly proven.

The next question in order, therefore, is, "whether the bridge, according to the plans on which it has progressed at the passage of this act (March 3, 1871), has been constructed so as substantially to comply with the provisions of law relating thereto."

Laws regulating construction of the bridge. Joint resolution of March 3, 1869.

The provisions of law relating thereto are:

1. The joint resolution giving the assent of the United States to the construction of the Newport and Cincinnati Bridge, approved March 3, 1869.

It is as follows:

"*Be it resolved, etc.*, That the consent of Congress be and the same is hereby given to the erection of a bridge over the Ohio river from the city of Cincinnati, Ohio, to the city of Newport, Kentucky, by the Newport and Cincinnati Bridge Company, a corporation chartered and organized under the laws of each of the States of Kentucky and Ohio: *Provided*, that said bridge is built with an unbroken or continuous span of not less than four hundred feet in the clear, from pier to pier, over the main channel of the river, and is built in all other respects in accordance with the conditions and limitations of an act entitled 'an act to establish certain post roads,' approved July fourteenth, eighteen hundred and sixty-two. That said bridge when completed in the manner specified in this resolution shall be deemed and taken to be a legal structure, and shall be a post road for the transmission of the mails of the United States; but Congress reserves the right to withdraw the assent hereby given in case the free navigation of said river shall at any time be substantially and materially ob-

structed by any bridge to be erected under the authority of this resolution, or to direct the necessary modifications and alterations of said bridge."

2. The 4th section of the act to establish certain post roads, approved July 14, 1862. 4th sec., Act of July 14, 1862.

It is as follows:

"SEC. 4. *And be it further enacted*, That any bridge erected under the privileges of this act, may, at the option of the company or companies building the same, be built either as a draw bridge, with a pivot or other form of draw, or with unbroken or continuous spans: *Provided*, that if said bridge shall be made with continuous or unbroken spans, it shall not be of less elevation than ninety feet above low water mark over the channel of the said river, nor in any case less than forty feet above extreme high water, as understood at the point of location, measuring for such elevation to the bottom chord of the bridge. Nor shall the span of such bridge, covering the main channel of the river, be less than three hundred feet in length, with also one of the next adjoining spans of not less than two hundred and twenty feet in length, and the piers of said bridge shall be parallel with the current of the river as near as practicable: *And provided also*, that if any bridge built under this act shall be constructed *as a draw bridge*, the same shall be constructed over the main channel of the river as understood at the time of the erection of the bridge, of not less than three hundred feet in length, and said span shall not be less than twenty feet above low water mark, measuring to the bottom chord of the bridge, and one of the next adjoining spans shall not be less than two hundred and twenty feet in length; and also that there shall be a pivot-draw constructed in every such bridge at an accessible and navigable point, with spans of not less than one hundred feet in length on each side of the central or pivot pier of the draw," etc.

It will be observed that the joint resolution of March 3, 1869, altered the requirements of the act of July 14, 1862, in two particulars: Span to be 400 instead of 300 feet.

1. It required that the span over the main channel of the river should be not less than *four hundred feet*, instead of *three hundred feet*.

Channel span to be continuous.

2. It required the same span to be *unbroken or continuous*, whereas, by the terms of the former law, in case of a *draw bridge*, the *draw* might have been located in the span over the main channel.

The bill alleges that the complainant adopted the alternative of a draw bridge, as authorized by the act of July 14, 1862, with a span over the main channel *four hundred feet* wide from pier to pier, and *unbroken or continuous*, as required by the joint resolution; and sets forth specifically the plan itself with allegations, appropriate and sufficient, to show that the plan itself was strictly in conformity with these provisions of law, as thus interpreted, and that the work of construction, as far as it progressed, conformed to the plan.

The answer to the question under discussion, then, must be found in the answer to be given to this:

Was the plaintiff authorized to build a draw bridge.

'Whether,' under these provisions of law, the plaintiff was authorized to build a *draw bridge* at all?

The purview of the resolution—the substantive and positive part of its active and enacting clause—is in the following words:

> "*Be it resolved, etc.*, That the consent of Congress be, and the same is hereby given to the erection of a bridge over the Ohio river, from the city of Cincinnati, Ohio, to the city of Newport, Kentucky, by the Newport and Cincinnati Bridge Company, a corporation chartered and organized under the laws of each of the States of Kentucky and Ohio."

Authority under charter.

If the joint resolution had ended here, the bridge company would have been authorized by Congress to

proceed with the erection of such a bridge as by its charter it was empowered to build, and without any other limitations or conditions, and such a structure would have been held to be lawful against all complaints in judicial tribunals.

This follows, because the joint resolution in the case supposed, giving the assent of Congress, in general terms, to the erection by the company of *a bridge*, its charter is the law which fixes for it what kind of a bridge it may build; and the assent of Congress is given with express reference to the fact that the bridge company is a corporation created by the laws of the two bordering states, and with knowledge conclusively presumed of the powers and privileges conferred by them upon it. And its assent, therefore, couched in such terms, necessarily confers upon the company authority, on the part of Congress, to exercise its corporate powers as derived from the states, in the manner pointed out in its charter.

This charter consists of three legislative acts and an act of consolidation. The Kentucky act of incorporation was approved February 5, 1868, and amended February 26, 1868, the amendment conferring power upon the corporation (sec. 6) "to become merged into a new corporation with any bridge company organized under the laws of the State of Ohio, to build a bridge across the Ohio river."

The Ohio act is a general law, under which the company organized, and contains a provision (sec. 10) authorizing it to consolidate its capital stock with the capital stock of any bridge company in an adjoining

state, authorized to construct a bridge across the Ohio river. It was passed April 3, 1868.

Under these provisions the two companies consolidated and became merged into one.

The fourth section of the Ohio act confers upon the company power to construct and maintain a bridge, "*either with a single span or with a draw, as the company may determine;* but in either case, in order that said bridge may not obstruct the navigation of said river, the same shall be built in accordance with the provisions of an act of Congress, approved July 14, 1862, entitled 'an act to establish certain post roads,' or of any act that Congress may hereafter pass on the subject."

The eleventh section of the same act is as follows:

"That any such company may fix or change the span and altitude of any bridge which it may erect and construct across the Ohio river, provided that the span of any such bridge be not less than *three hundred feet* in the clear over the main channel, and not less than two hundred and twenty feet in the clear in one of the next adjoining spans, and the height of the bridge in the center of the span over the main channel shall not be less than one hundred feet above the surface of the water at low water, measuring for such elevation to the bottom chord of the bridge, and such height above extreme high water mark as may be provided in any act of Congress now in force, or which may hereafter be passed. *But this section shall not apply to any bridge* BUILT WITH A DRAW, *in accordance with the provision of an act of Congress approved July* 14, 1862, entitled an act to establish certain post roads, or any act that Congress may hereafter pass on the subject."

The point we insist on here is, that the joint resolution of March 3, 1869, in its enacting part, of which

we are now considering the effect, as if it stood by itself without a proviso, is to be read and interpreted as if it recited and incorporated with itself the entire charter of the Newport and Cincinnati Bridge Company, to which it refers, and especially those clauses above referred to and set out.

And the conclusion is, that so read and interpreted, it will be necessarily taken to mean the same *as if it expressly authorized the bridge company to build its bridge with a draw, in accordance with the provision of the act of Congress of July* 14, 1862.

This rule of construction is well expressed by the Supreme Court of Ohio in an early case—*Ludlow's Heirs* v. *Johnson*, 3 Ohio, 572—in the following language:

> "When in one statute a reference is made to an existing law, in prescribing the rule or manner in which a particular thing shall be done, or for the purpose of ascertaining powers with which persons named in the referring statute shall be clothed, the effect, generally, is not to revive or continue in force the statute referred to, for the purposes for which it was originally enacted, but merely for the purpose of carrying into execution the statute in which the reference is made. For this purpose, the law referred to is, in effect, incorporated with, and becomes a part of, the one in which the reference is made, and so long as that statute continues, will remain a part of it, although the one referred to should be repealed. Such repeal would no more affect the referring statute than a repeal of this latter would the one to which reference is made."

Proceeding now with the analysis of the joint resolution of March 3, 1869, let us consider the effect of the proviso.

Its language is as follows:

"*Provided*, That said bridge is built with an unbroken or continuous span, of not less than four hundred feet in the clear, from pier to pier, over the main channel of the river, and is built in all other respects in accordance with the conditions and limitations of an act entitled an act to establish certain post roads, approved July fourteenth, eighteen hundred and sixty-two."

Here, again, is a further and an express reference to the act of July 14, 1862, and the remark already made as to the previous part of the resolution, applies to the proviso that it is to be read and construed as if the entire act referred to was set out in it *totidem verbis*.

It may be well, before considering the particular phraseology of the proviso in question, to advert to the office and function of provisos generally.

"'A proviso in deeds or law,' says Mr. Justice BALDWIN, in the case of *Voorhees* v. *Bank of the United States*, 10 Peters, 449, is a limitation or exception to a grant made or authority conferred, the effect of which is to declare that the one shall not operate, or the other be exercised, unless in the case provided."

In *Wayman* v. *Southard*, 10 Wheat. 30, C. J. MARSHALL had previously said:

"The proviso is generally intended to restrain the enacting clause and to except something which would otherwise have been within it or in some measure to modify the enacting clause."

"'A proviso,' says Dwarris on Statutes, 514, 'is something engrafted upon a preceding enactment, and is legitimately used for the purpose of taking special cases out of the general enactments and providing specially for them.'"

An arbitrary rule, in regard to *provisoes*, wherein they are held to differ from *saving clauses*, is, that when a proviso is directly repugnant to the purview of the act, the proviso shall stand and be held a repeal of the

purview, because it was said it speaks the last intention of the law-giver.

Dwarris on Statutes, 515.

Attorney General v. *Chelsea Water Works*, Fitzgibbon, 195.

1 Kent's Com. 430.

Wherefore it follows, that being an exception from a general enactment, making special provisions for a special case, and operating in case of repugnancy as an implied repeal, the rule of construction as to *repeals by implication* must apply, which is that they are not to be extended beyond the words by any thing less than a necessary construction. Sedgwick on Statutory and Constitutional Law, 126 et seq.

Let us examine now the language of the proviso. Proviso in act of July 14, 1862.

The conditions which it attaches to the construction of the "*said bridge*," which means, undoubtedly, the particular bridge which this company by its charter is authorized to build, are two only:

1. That it is built with an unbroken or continuous span of not less than four hundred feet in the clear, from pier to pier, over the main channel of the river.

2. And is built in all other respects in accordance with the conditions and limitations of the act of July 14, 1862.

Turning now to this last mentioned act, we inquire what are *its conditions and limitations?*

We find that by the third section it is declared,

"that it shall be lawful for any other railroad company or companies whose line or lines of road may now or shall hereafter be built to the Ohio river, above the mouth of the Big Sandy river, in accordance with the terms of the charter or charters of such

company or companies, to build a bridge across said river for the more perfect connection of any such roads, and for the passage of trains thereof, *under the limitations and conditions hereafter provided.*"

These limitations and conditions the act then proceeds to define and prescribe in the next, the fourth section; and it is therefore to that section that the same language of the proviso in the joint resolution of March 3, 1869, "in accordance with the conditions and limitations" of the said act, undoubtedly refers.

It seems to have been imagined by some that the circumstance that the act of July 14, 1862, at the time of its passage, was confined in its application to the case of bridges to be built above the mouth of the Big Sandy river, must have some legal if not controlling efficacy in the construction of the joint resolution of March 3, 1869, extending its application, with a single modification, to the case of a bridge at Cincinnati.

But there is no foundation for such a conjecture. It may be true that the specifications proper for a bridge at Steubenville or Parkersburg may not be so suitable for one at Newport; but if Congress chooses to adopt the same for all these localities, no one can gainsay it; and if it adopts them, with a single variation, it is not permissible to add any others.

Neither is there any thing in the nature of the case, upon the face of the act of July 14, 1862, to make its general application to all parts of the river, inconsistent or impracticable.

The only circumstances to which such an effect has been attributed is, that the water at Cincinnati rises

higher above low water mark than at points above the Big Sandy river.

But this could not affect the question of navigation, in the case of a bridge *without a draw*, because its elevation is to be forty feet above extreme high water, as understood at the point of location, and therefore the clearance or headway under that description of bridge would be the same at all points.

In the alternative case of a draw bridge, as defined by the act, the height above low water is the only elevation fixed, or that it was necessary to fix, and that, as in the converse case (of the other kind of bridge, the distance above high water), was fixed the same for all points. The provision for all cases of high water, which prevented vessels from going under the bridge, was *the draw itself*. Why make any provision at all for the distance of the bridge above high water, in case of a draw bridge? Why permit a draw at all, if it was intended the bridge should be high enough to admit the passage of boats in high water? A draw being authorized is upon the assumption that the bridge is not to be high enough to admit the passage of boats at such times. The only material and important consideration is, that it should be high enough to admit the passage *at the main channel* of boats at *low water*, when the draw would or might not be accessible or navigable. And so undoubtedly Congress viewed it in framing the provisions of that act.

To understand perfectly the references and provisions of the joint resolution of March 3, 1869, it is important to examine, in detail, *the conditions and limitations* of the act of July 14, 1862.

They are contained, as we have already seen, in the fourth section.

That contains:

1. The purview or substantive enactment. It provides that "any bridge erected under the privileges of this act, may, *at the option of the company or companies building the same*, be built *either as a draw bridge, with a pivot or other form of draw*, or *with unbroken or continuous spans*."

2. A proviso, which specifies "that if the said bridge shall be made with *continuous or unbroken spans*, it shall not be of less elevation than ninety feet above low water mark over the channel of the said river, nor in any case less than forty feet above extreme high water, as understood at the point of location, measuring for such elevation to the bottom chord of the bridge. Nor shall the span of such bridge, covering the main channel of the river, be less than three hundred feet in length, with also one of the next adjoining spans of not less than two hundred and twenty feet in length, and the piers of said bridge shall be parallel with the current of the river, as near as practicable."

3. A second proviso, specifying "that if any bridge built under this act shall be constructed as a draw bridge, the same shall be constructed with a span over the main channel of the river, as understood at the time of the erection of the bridge, of not less than three hundred feet in length, and said span shall not be less than seventy feet above low water mark, measuring to the bottom chord of the bridge, and one of the next adjoining spans shall not be less than two hundred and twenty feet in length; and also that there shall be a pivot draw constructed in every such bridge at an accessible and navigable point, with spans of not less than one huudred feet in length on each side of the central or pivot pier of the draw; and also that said bridge shall always be opened promptly, upon reasonable signal, for the passage of boats whose construction may not, at the time, admit of their passing under *the permanent spans* of said bridge," etc.

The language of these conditions and limitations, is, in the main, free from ambiguity. They clearly con-

fer upon the company, authorized to proceed under the act, the option to choose between two descriptions of bridge—one a *draw bridge*, the other, a bridge *with unbroken or continuous spans*.

How do these two classes of bridges specifically differ?

The answer is obviously furnished not more by their names than by the precise specifications contained for each in the two provisos.

One is a bridge, *all of whose spans* are *unbroken* by *any draw*, and so each of which is a *continuous* span, not *divided*, as is a *draw span*, by a central pier, on which, *as a pivot*, the superstructure connecting the two extreme piers of the draw span wings, and so opens for the passage of boats. This is a bridge with *continuous or unbroken spans*.

The other is a draw bridge, one of whose spans is *broken or divided*, and not *continuous*, but opens by means of a draw which swing apart and turns upon a pivot, a portion of the superstructure resting upon a central pier, which divides the draw span into two smaller spans, but the remainder of whose spans—all except that one—are *unbroken or continuous*, just as in the other case, or as they are described in the second part of the second droviso, are *permanent spans*; that is, fixed, not opening, always unbroken and continuous.

These two kinds of bridges, differing specifically in the point just mentioned, were, in some respects, to be alike.

In the bridge to be made with continuous and unbroken spans, all of its spans were to be of that description; that is, without a draw; but the one over the

main channel was to be not less than three hundred feet long, and one of the next adjoining spans not less than two hundred and twenty feet long. Nothing is said as to the length of any others.

In these particulars, as to the length of two of the spans, that over the main channel and one of the next adjoining, the specification is the same in the case of the draw bridge; but a further specification fixes the character and size of the draw span.

The former is a bridge consisting of a series of spans, each of which is unbroken or continuous.

The latter is a bridge consisting of a series of spans, all of which are unbroken or continuous, except one, which is a draw span.

What, then, is the meaning of the proviso in the joint resolution of March 3, 1869? Does it forbid the construction of a draw bridge, either expressly or by necessary implication?

If the language of the proviso were, that the bridge thereby authorized should be built in all respects in accordance with the conditions and limitations of the act of July 14, 1862, there would be no question of the right to construct a draw bridge.

Now, that language is used with but one qualification, that the said bridge should be built with an unbroken or continuous span of not less than four hundred feet in the clear from pier to pier over the main channel of the river, whereas the act referred to only required that the span over the main channel should be three hundred feet, and required it in both kinds of bridges. This span is required to be *unbroken or continuous*. But that is not required of any other span, and

so determines nothing against *a draw bridge*, except, as the expression of one is the exclusion of the other, it obviously suggests the inference that if it had been the intention of Congress to insist upon this requisite as to all, it would not have confined it to one.

The argument in support of the opposite construction is, that the words "unbroken or continuous" applied to the span over the main channel, must be taken to have some office—that they have none if the construction of a draw bridge is allowed under the law, the meaning, upon that view of the joint resolution, being the same without those words as with them—and that their real function, therefore, is to determine the character of the structure as a bridge without a draw; and thus, upon the principle of the maxim, *singula singulis reddenda*, to limit the subsequent general words of reference to the conditions and limitations of the act of July 14, 1862, to such of them solely as apply to bridges with *unbroken or continuous spans*.

It is conclusive, we think, against this reasoning.

1. That it sets aside the literal and natural meaning of the words, without any justification, except the necessity of the preconceived theory it was invented to support.

2. It is based upon the false assumption that the description of a bridge as having a span over the main channel of the river, which is *unbroken or continuous* characteristic under the act of July 14, 1862, which bridges all whose spans are unbroken or continuous, a like im- so excluding the construction of a draw span elsewhere, terms of that act that it was not intended draw, unless all that it was intended to include in

and in point of fact as described in that law, draw bridges, as well as the others, have spans—all but one which are unbroken or continuous.

3. It is also based on the erroneous assumption that the words "unbroken or continuous," as applied to the main channel span, can have no other office than that supposed.

It is not inadmissible to insist that the words have no function at all. It is not necessary in law to suppose that every word actually used was logically essential. It does occasionally happen that they are used needlessly. Tautology is sometimes discovered in a statute.

But it is not necessary to resort to this argument. We can easily find another reason than that alleged for the introduction of these words.

By reference to the fourth section of the act of July 14, 1862, in the second proviso, specifying the manner in which draw bridges shall be built, it will be seen that it is not there expressly declared where the draw span shall be, relatively to the other spans. It fixes a span over the main channel three hundred feet in length. It establishes one, next adjoining, to be two hundred and twenty feet in length. It then adds: "And also that there shall be a pivot draw constructed in every such bridge at an accessible and navigable point, with spans of not less than one hundred feet in length on each side of the central or pivot pier of the channel; this, a draw span which shall be in length two quired that the sition to the thickness of the pivot three hundred feet, and required it bridges. This span is required to be the construc*tions*. But that is not required of n over the main

channel, except that in that event it must be three hundred feet in length, which might be and leave less than one hundred and fifty feet on each side of the pivot pier.

The joint resolution of March 3, 1869, by requiring the span over the main channel to be not less than four hundred feet in the clear from pier to pier (language not found in any part of the act of July 14, 1862, as to either kind of bridge), and also that it should be "unbroken or continuous," effectually prevents what otherwise was permissible—the location of the draw span over the main channel. And the use of such language would not naturally have occurred to any draftsman of the law, who did not have in his mind at the time the idea and expectation that, under its authority, a draw bridge, as contemplated by the act of July 14, 1862, might properly be built with the intention and design, by its use, to regulate that authority to the extent alone of forbidding the location of the draw span in the main channel of the river. For, whether the word "span" be taken to mean the superstructure which spans the space from pier to pier, or the space of water way between the piers, in order to keep an open channel of four hundred feet in the clear for the passage of boats, without the obstruction of a central or pivot pier of a draw span, it would be necessary to describe it as an "unbroken or continuous span." While, then, the implication is necessary which forbids the draw span over the main channel, a like implication, equally strong, arises, that it was not intended to forbid the construction of a draw span elsewhere, and, consequently, that it was intended to include in

the permission the original option between the two kinds of bridges—draw bridges, and those with unbroken and continuous spans.

The location of the piers with reference to the current.

The 4th section of the act of July 14, 1862, required that the piers should be constructed "parallel with the current of the river, as near as practicable." It is alleged in the answer that they were not so constructed. Touching this allegation, it is submitted:

1. That, whether the piers were constructed in accordance with the act or otherwise, is a judicial question, and the subject was not submitted to or passed upon by any judicial tribunal prior to March 3, 1871.

2. Congress neither ascertained or declared that the piers, as constructed, were not in conformity to the law in this particular or any other. The act of March 3, 1871, required no change to be made in the location of the piers. They stand now as they stood in the outset, and no testimony to the effect that the bridge has proven an obstruction to navigation has been offered.

3. The testimony proves that the piers were constructed "parallel to the current, as near as practicable."

Mr. WILSON testifies (Ques. 29) that "the piers were all located at right angles to the axis of the bridge; the direction of the current in the channel of the river *being nearly parallel to the piers*, while the current near the Kentucky shore, where the pivot span was situated, made an angle of ten or twelve degrees with the line of the piers." Again (Ques. 86), that "the direction of the current in the channel was, according to my recol-

lection, about five degrees out of the direction of the piers." This witness, an accomplished engineer, ascertained these facts by actual observation in the discharge of his professional duty to the complainant in October, 1868. The observations of Col. MERRILL were made in the summer of 1870. It is quite probable that some changes had taken place in the direction of the current between that date and the date of Mr. WILSON'S observations.

Col. MERRILL, a witness for the Government, testifies that the piers were at right angles to the axis of the bridge, and that a bridge thus built is better and safer than an "askew bridge." (Ques. 24.) He gives cogent reasons for this opinion, saying that "long-span bridges ought always to rest on piers at right angles to the axis, and I know of none that are not so built." He testifies that the piers were not parallel to the current at the date of his observations, in 1870, and that the deflection amounted to twelve degrees; that it would have been practicable to have constructed them parallel to the current, but that it would have been necessary, in order to do so, to carry the Cincinnati end of the bridge westward to the center of Pike street, a distance of 460 feet! Col. MERRILL was speaking as an engineer, and of that which was "practicable" with reference to engineering science, but that word in this statute will not be given a meaning so restricted. The change thus indicated would have rendered necessary the purchase of an entire square or block of improved city property, and the procurement of the consent of the city authorities and the general public to the appropriation of Pike street. These facts may well

be considered in determining the effect to be given to the term "practicable."

Mr. ROBERTS testifies (Ques. 29) to the necessity of building the piers at right angles to the axis of the bridge; to the fact that steamers, in passing this point, do not run parallel with the current, but parallel with the piers (Ques. 7), and that the bridge, as constructed, has not been an obstruction to the navigation of the Ohio (Ques. 9).

FRAUD.

It is alleged that Judge NICHOLAS HEADINGTON, who sustained either an official or professional relation to the complainant, represented to the two representatives in Congress for the Cincinnati District that it was the intention of complainant to build a bridge a hundred feet high, and that they communicated that fact to the representative for the Pittsburg District; and that the three representatives aforesaid thereupon, and by reason thereof, supported the resolution of March 3, 1869. To this it may be said:

1. The Hon. NICHOLAS HEADINGTON, who was, during his life, an ornament to the bench and bar of Hamilton county, Ohio, died prior to March 3, 1871. He has not been present, therefore, to compare his recollection of his conversation with the two gentlemen referred to, with theirs.

2. It does not appear that the statement imputed to Judge HEADINGTON was false. On the contrary, the testimony shows that before the construction of the bridge was commenced, the complainant had contemplated the erection of a higher bridge.

3. It is not necessary to present argument or to

cite authority to this Court, to show that such testimony is inadmissible for the purpose of invalidating, or in any way affecting, an act of Congress.

III.

The final and main question is, "the liability of the United States, if any there be, to the said company by reason of the changes by this act required to be made."

As a necessary preliminary to the discussion of this question, it becomes important to inquire what rights the complainant had acquired, in reference to the construction and use of its bridge, irrespective of those secured by the joint resolution of Congress of March 3, 1869.

Rights of complainant irrespective of joint resolution of March 3, 1869.

The complainant was, prior to that date, a corporation created by and organized under the laws both of Kentucky and Ohio.

By its Kentucky charter, the only condition attached to its right to build its bridge is contained in the proviso to the 7th section—"*that said bridge shall be constructed so as not to obstruct the navigation of the Ohio river further than the laws of the United States authorize.*"

Kentucky charter.

By the 4th section of the Ohio law, it was authorized to build its bridge "either with a single span or with a draw, as the company may determine; but in either case, in order that said bridge may not obstruct the navigation of said river, the same shall be built in

Ohio charter.

accordance with the provisions of an act of Congress approved July 14, 1862, entitled 'an act to establish certain post roads,' *or of any act that Congress may hereafter pass on the subject.*"

This last clause, of course, refers only to such future congressional legislation as might be made prior to the actual construction of the bridge.

There can be no question that these state laws were sufficient to authorize the complainant to construct its bridge, according to their terms.

Gilman v. Philadelphia, 3 Wall. 725.

In *Gilman* v. *Philadelphia*, 3 Wall. 725, Justice SWAYNE, speaking for the Court, says:

> "The power to authorize the building of bridges is not to be found in the federal constitution. It has not been taken from the states. It must reside some where. They had it before the constitution was adopted, and they have it still."

This power is subject only to the paramount authority of Congress, under the constitutional grant "*to regulate commerce . . among the several states*," etc., when actually exercised.

Gibbons v. *Ogden*, 9 Wheat. 1.

Wilson v. *The Blackbird Creek Marsh Co.*, 2 Peters, 250.

The commercial power of Congress over the navigable rivers of the United States "which are accessible from a state other than those in which they lie," "necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the states or otherwise; *to remove such obstructions when they exist;* and to provide, by such sanctions as they

may deem proper, against the occurrence of the evil and for the punishment of offenders."

Gilman v. *Philadelphia*, 3 Wall. 725.

In the case of *Railroad Co.* v. *Fuller*, 17 Wall. 568, Mr. Justice SWAYNE has made the most recent summary of the law upon this point. He says:

"In the complex system of policy which exists in this country, the powers of government may be divided into four classes: Those which belong exclusively to the states; those which belong exclusively to the national government; those which may be exercised conveniently and independently by either, and those which may be exercised by the states, but only until Congress shall see fit to act upon the subject. The authority of the state then retires and lies in abeyance until the occasion for its exercise shall receded. Commerce is traffic, but it is much more. It embraces also transportation by land and water, and all the means and appliances necessarily employed in carrying it on. The authority to regulate commerce, lodged by the constitution in Congress, is in part within the last division of the powers of government above mentioned. Some of the rules prescribed in the exercise of that power must from the nature of things be uniform throughout the country. To that extent the authority itself must necessarily be exclusive, as much so as if it had been declared so to be by the constitution in express terms. Others may well vary with the varying circumstances of different localities. *Where a stream, navigable for the purposes of foreign or inter-state commerce, is obstructed by the authority of a state, such exercise of authority may be valid until Congress shall see fit to intervene. The authority of Congress in such cases is paramount and absolute, and it may compel the abatement of the obstruction whenever it shall deem it proper to do so.*" *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Peters, 250; *Gilman* v. *Philadelphia*, 3 Wall. 728; *Wheeling Bridge Case*, 18 How. 430; *Cooley* v. *Board of Wardens*, 12 How. 319; *Ex parte McNiel*, 13 Wall. 240; *The James Gray* v. *The John Naser*, 21 How. 184; *Osborne* v. *City of Mobile*, 16 Wall. 479.

Judge COOLEY (Const. Lim. 593) says:

"In general terms it may be said that the state may authorize such constructions, provided they do not constitute material obstructions to navigation; but whether they are to be regarded as material obstructions or not is to be determined in each case upon its own circumstances. . . The decision of the state legislature that the erection is not an obstruction is not conclusive; but the final determination will rest with the federal court, who have jurisdiction to cause the structure to be abated if it be found to obstruct unnecessarily the traffic upon the water. Parties constructing the bridge must be prepared to show, not only the state authority, and that the plan and construction are proper, but also that it accommodates more than it impedes the general commerce."

Wheeling Bridge Case, 13 How. 529; 18 How. 430.

In the *Wheeling Bridge Case*, 13 Howard, 519, the Supreme Court granted a decree to abate the bridge as a nuisance. The principles on which that judgment proceeded are thus stated by the Court in the report of the subsequent proceedings in the case, 18 Howard, 430:

"The bridge had been constructed under an act of the legislature of the State of Virginia; and it was admitted that act conferred full authority upon the defendants for the erection, subject only to the power of Congress in the regulation of commerce. It was claimed, however, that Congress had acted upon the subject and had regulated the navigation of the Ohio river, and had thereby secured to the public, by virtue of its authority, the free and unobstructed use of the same; and that the erection of the bridge, so far as it interfered with the enjoyment of this use, was inconsistent with and in violation of the acts of Congress, and destructive of the right derived under them; and that, to the extent of this interference with the free navigation of the river, the act of the legislature of Virginia afforded no authority or justification. It was in conflict with the acts of Congress, which were the paramount law."

After the rendition of this decree, Congress passed an act legalizing this bridge, the Court upholding the legislation as a constitutional exercise of power, in reference to the future, so as to deprive the plaintiff of the relief sought by an injunction.

Subsequently Congress passed the act of July 14, 1862, legalizing the Steubenville bridge; and authorizing the building of railroad bridges across the Ohio river above the mouth of the Big Sandy river, under the limitations and conditions therein contained.

Under this state of the law, we think it can not be disputed that the complainant had authority under its charter, without the aid of the joint resolution of March 3, 1869, to erect its bridge upon the original plan; that, if it had done so, it would have been a lawful structure, unless in point of fact it had obstructed the free navigation of the Ohio river to a degree forbidden by any existing legislation by Congress; that, considering the action of the Court in reference to avoiding the necessity of elevating the Wheeling Bridge, by permitting the experiment to be made of the effect of a draw (13 Howard, 622); and the public policy as to railroad bridges, evinced by the passage of the act of Congress of July 14, 1862, as well as the action of Congress in relation to the Wheeling Bridge itself, there is no reason to believe that the Newport and Cincinnati Bridge, if it had been actually built upon its original plan, would ever have been found to be a public nuisance by reason of being an obstruction to navigation.

Complainant's right to build subject only to result of judicial

At any rate, the company had authority to build it, and the only risk it could encounter was the result of a judicial proceeding to enjoin its construction or abate it

proceeding, to enjoin as a nuisance, or abate, when built.

when built as a public nuisance, at the suit of some private person complaining of special and irreparable mischief.

The principles on which the jurisdiction of the courts of the United States rests, and according to which it must be exercised, in dealing with bridge structures alleged to be public nuisances as obstructions to the navigation of rivers, are considered and stated by this Court in the case of the *Mississippi and Missouri Railroad Company* v. *Ward*, 2 Black, 485. The following extracts from the opinion of the Court in that case have important applications in the determination of this:

Mississippi & Missouri R. R. Co. v. *Ward*, 2 Black, 494. *Chicago* v. *McGrim*, 51 Ill. 266; 2 Am. Rep. 295.

"A bill in equity to abate a public nuisance, filed by one who has sustained special damages, has succeeded to the former mode in England of an information in chancery, prosecuted on behalf of the crown, to abate or enjoin the nuisance as a preventive remedy. The private party sues rather as a public prosecutor than on his own account; and unless he shows that he has sustained, and is still sustaining, individual damage, he can not be heard. He seeks redress of a continuing trespass and wrong against himself, and acts in behalf of all others who are or may be injured." (p. 492.) . . .

"The complainant sued in the Federal Court because of his citizenship in a different state from the defendant; and the United States District Court holden in Iowa exercised the same jurisdiction that a state court of Iowa could have exercised, and no more. It had no power beyond the middle of the river. On that part of the bridge within Iowa and its piers, the Court below acted and ordered that the structure should be removed." (p. 493.) . .

"An indictment could only have been prosecuted against the owners for keeping up the nuisance in Illinois in the courts of that state, because the nuisance was a trespass and crime against the laws of Illinois and the injuries to the complainant's boats giving him the privilege to sue and abate the obstruction

was as local as the public right to indict. He asks nothing from the person of the defendant, but seeks to remove a local object, because he has sustained special damage from that object. The District Court had no power over the local object inflicting the injury; nor any jurisdiction to inquire of the facts, whether damage had been sustained or how much. These facts are beyond the Court's jurisdiction and powers of inquiry, and outside of the case." (p. 494) . . .

"In the next place: Is the bridge *west* of the Illinois boundary an *unreasonable* obstruction, and therefore a nuisance, that a court of chancery can lawfully remove? In considering this question we must be governed by the same rule on which a court of law could proceed in case of an indictment against the bridge company for committing the nuisance; and the rule is, that if the abridgment of the right of passage occasioned by the erection was for a public purpose and produced a public benefit, and if the erection was in a reasonable situation and a reasonable space was left for the passage of vessels on the river, then it is not an unreasonable obstruction and indictable." Citing *Rex* v. *Russell*, 6 Barn. & Cres. 566; 13 How. 623; 15 Wendell, 133.

"Then, again, the obstruction to navigation must be plainly a nuisance within this rule before it can be removed by decree. If the proceeding was by indictment, and the jury doubted whether the obstruction was a nuisance or not, they would be instructed to acquit the defendant; and so, if this case was referred to a jury to try the fact, and they doubted, they would be bound to acquit. And the same rule applies in a court of chancery when the Court ascertains the fact of nuisance." 2 Story's Com. on Eq. 203, 204.

No indictment would lie in a Federal Court, Congress having conferred upon the courts of the United States no such jurisdiction.

U. S. v. *New Bedford Bridge*, 1 Wood. & Min. 401.

United States v. *New Bedford Bridge*, 1 Woodbury & Minot, 401.

The conclusion we draw from this statement of the law is, that at the time of the passage of the joint

resolution of March 3, 1869, the complainant had legal authority to build its bridge according to the original plan, subject only to the result of a judicial proceeding to restrain its construction, or abate it, when built, on proof of the fact that it would cause or had caused a material obstruction to the navigation of the river.

This conclusion must be accepted in connection with the following allegations in the complainant's bill in this case:

Allegation of bill, that the bridge, as erected, was not an obstruction; and would not have been, if completed.

"That said bridge, as erected under said plan, had not, at the time the same was required to be altered as aforesaid, substantially and materially obstructed the free navigation of the said river; and that the same, if it had been completed according to said plan, would not have been a substantial and material obstruction of said navigation." Printed Bill, 31, § 23.

These allegations, though denied, are not disproved.

Consideration of joint resolution of March 3, 1869.

This leads to a consideration of the nature, meaning and consequences of the joint resolution of March 3, 1869, and of what was done under it.

This resolution contains three principal matters:

1. The consent of Congress to the construction of the bridge, upon the prescribed plan.

2. A declaration that the bridge, when completed in the manner specified, should be deemed to be a legal structure.

3. A reservation of a right in Congress to withdraw its assent thereby given, or to direct the necessary modifications and alterations of the bridge, *in case the free navigation of the river should at any time be substantially and materially obstructed by any bridge to be erected under the authority of the resolution.*

We claim, in the first place, that by the acceptance of the terms of this resolution, and the performance of its conditions on the part of the complainant, it became an *executed contract* between it and the Government. An executed contract.

That after it had been executed the United States violated its terms, *by withdrawing its assent*, by the passage of the act of March 3, 1871. Violated by the U. S.

That by this last named act, directing and requiring the changes to be made to the bridge, as a condition precedent to the right to bring this suit, and the performance of that condition by the plaintiff, the United States entered into a new contract, one of the terms of which is, that it will pay to the plaintiff the compensation to be awarded in the event that it shall be judicially ascertained that its previous contract was obligatory, and that it has committed a breach of it. Act of March 3, 1871, a new contract to indemnify, for breach of former.

There is no constitutional provision operating upon the Government of the United States as there is limiting the power of the individual states, by which Congress is prohibited from passing any law which impairs the obligation of a contract; but when the United States consents to be sued upon its contracts, and agrees to pay the damages awarded for breaking them, it is in the same situation as if a previously adopted and obligatory provision of law had made it illegal to violate i[illegible]. U. S., by consenting to be sued, placed itself in same position as a state under the provision of the Federal Constitution, prohibiting it from impairing the obligation of contracts.

We claim, in the second place, that under the protection of the law and upon the faith of the contract, embodied in the joint resolution of March 3, 1869, the complainant, having proceeded in the construction of its bridge, acquired *a vested right of property* in it, as a Complainant had vested right of property.

bridge, and with the right to exercise their franchise, in the use of it. under their charter.

Complainant's rights, as secured by the constitution, violated.

That the United States, by the subsequent act of Congress of March 3, 1871, making the completion of the bridge upon the original plan and its future use, unlawful, has violated the rights of the plaintiff, as secured to it by the constitution of the United States.

1. By being deprived of property without due process of law.

1. In that provision of the fifth amendment which declares that "no person shall be . . . deprived of life, liberty, or property, *without due process of law*."

2. By property being taken for public use, without just compensation.

2. In that provision of the same amendment which declares, "nor shall private property be taken for public use, without just compensation."

3. By operation of an *ex post facto law*.

3. In that provision of the 9th section of article 1, which says, "No bill of attainder or *ex post facto law* shall be passed."

Definition of contract. Pandects, Goudsmit by Gould, 138.

The most general definition of the essential constitution of a contract is thus stated in Gould's Goudsmit's Pandects, 138:

> "An agreement (convention) may therefore be defined as follows: 'The accord or concurrence of the will (volition) of two or of several, distinct persons, reciprocally declared and serving to regulate legal relations;' *and it is made available not merely in the matter of obligations, but throughout the whole realm of law, whether public or private.*"
>
> "In the matter of obligations, when the concurrence of volitions, linked together in a certain sense, the persons who were parties to the act, the legal relation existing between them, could be annulled only by a new concurrence of volition." Ib. 142.

If the Newport and Cincinnati Bridge Company had derived its corporate existence from a charter granted by Congress, containing the provisions of

the joint resolution of March 3, 1869, there could be no doubt, under the decisions of the courts of the United States, but that the whole grant would have been a contract between the *corporators* and the Government. That the company had already been created by the States of Kentucky and Ohio makes it simply a contract between the *corporation* and the Government.

The Supreme Court of the United States, in *Strother* v. *Lucas*, 12 Peters, 454, say:

Strother v. *Lucas*, 12 Peters, 454.

"That a grant may be made by a law, as well as a patent pursuant to a law, is undoubted (6 Cr. 128); and a confirmation by a law is as fully to all intents and purposes a grant, as if it contained in terms a grant *de novo*."

Mignon's Lessee v. *Aster*, 2 How. 319; *Sims* v. *Irvine*, 3 Dall. 425; *Fatton* v. *Euston*, 1 Wheat. 476.

The nature of such a contract is described by Justice DAVIS in the case of the *Binghampton Bridge*, 3 Wall. 74:

Binghampton Bridge Case, 3 Wall. 74.

"The legislature, therefore, says to public-spirited citizens, 'If you will embark with your time, money, and skill, in an enterprise which will accommodate the public necessities, we will grant to you, for a limited period or in perpetuity, privileges that will justify the expenditure of your money, and the employment of your time and skill.' *Such a grant is a contract, with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it.*"

Grant of franchise acted on, a contract.

And in that case the point decided was, that a provision that "it shall not be lawful for any person or persons to erect a bridge within a distance of two miles," was to be construed and enforced as a *contract* on the part of the state, that the legislature *would not make it lawful* by licensing any person or association of persons to do it. (p. 81.)

Butler v. *Pennsylvanir*, 10 How. 416.

In *Butler* v. *Pennsylvania*, 10 How. 416, a test is established for determining between those public acts of a sovereign body which are *contracts* and those which are not. The Court, speaking of such contracts, said they "are contracts by which *perfect rights*, *certain*, *definite*, *fixed*, *private rights of property* are vested. These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or state government for the benefit of all, and from the necessities of the case, and according to universal understanding, to be varied or discontinued as the public good shall require."

Appointment to public office not a contract.

Hence, in that case, it was held that there is no obligation as of a contract, on the part of the state, to continue the existence of a public office, so that the incumbent may realize its emoluments.

Exemption personally from public duties, not a contract.

So the claim of a particular citizen to personal immunity from taxation, from jury duty or military duty, not being a right of property, and having none of the distinctive characteristics of that class of interests which are susceptible of possession or ownership, is merely the incidental benefit which springs from the operation of general laws, have not the protection of contract, and can not be placed on the footing of absolute security against all future legislation.

People v. *Roper*, 35 N. Y. 629.

Metropolitan Board of Excise v. *Barrie*, 34 N. Y. 657, 668.

Harbury v. *The People*, 22 N. Y. 102.

Conner v. *Mayor of New York*, 1 Seld. 285.

But exemption, when ma le condition of title

But where the exemption from taxation has been affixed as a condition of the title to property, on the faith of which it has been acquired, it has uniformly

been enforced, as founded upon the obligation of a contract, restraining and abridging even the vital sovereign power of taxation. to property is contract.

New Jersey v. *Wilson*, 7 Cranch, 164.
Gordon v. *Appeal Tax Court*, 3 Howard, 133.
Piqua Bank v. *Knoop*, 16 How. 369.
Ohio Life Ins. and Trust Co. v. *Debolt*, 16 How. 416.
Dodge v. *Woolsey*, 18 How. 331.
Jefferson Bank v. *Skelly*, 1 Black, 436.
McGhee v. *Mathis*, 4 Wall. 143.
Home of the Friendless v. *Rouse*, 8 Wall. 430.
Wilmington Railroad v. *Reid*, 13 Wall. 264.

"It is said that the power of taxation is among the highest powers of a sovereign state; that its exercise is a political necessity, without which the state must cease to exist, and that it is not competent for one legislature, by binding its successors, to compass the death of the state. It is too late to raise this question in this Court." *Humphrey* v. *Pegues*, 16 Wall. 249.

In the case of *Salt Co.* v. *East Saginaw*, 13 Wall. 378, it was said: *Salt Co.* v. *East Saginaw*, 13 Wall. 378.

"Charters granted to private corporations are held to be contracts. Powers and privileges are conferred by the state, and corresponding duties and obligations are assumed by the corporation. And if no right to alter or repeal is reserved, *stipulations as to taxation*, OR AS TO ANY OTHER MATTER WITHIN THE POWER OF THE LEGISLATURE, ARE BINDING ON BOTH PARTIES; and so corporations formed under general laws in place of special charters, like the Ohio banks under the general banking law of that state, are entitled to the benefit of specific provisions and exemptions contained in their laws, which are regarded in the same light as if inserted in special charters." Stipulations as to any matter within the power of the legislature, binding on both parties.

But "general encouragements held out to all per-

sons indiscriminately to engage in a particular trade or manufacture, whether such encouragement be in the shape of bounties or drawbacks or other advantage, are always under the legislative control, and may be discontinued at any time," because they do not "belong to that class of laws which can be denominated contracts, *except so far as they have been actually executed and complied with.*"

McGee v. *Mathis*, 4 Wall. 143.

In *McGhee* v. *Mathis*, 4 Wall. 143, it was held that "where a state, in order to promote the drainage and sale of certain swamp lands belonging to it, and which it was desirous of reclaiming, has passed, by way of encouraging purchasers, a law that such lands "*shall be exempt from taxation for the term of ten years*," and issued transferable scrip receivable for them, a repeal of the exemption act, so far as it concerns lands paid for either before or after the repeal, with scrip issued before the repeal, impairs a contract of the state with the holders of such scrip. The Chief Justice, CHASE, said:

"It is not doubted that the grant by the United States to the state upon conditions, and the acceptance of the grant by the state, constituted a contract. All the elements of a contract met in the transaction—competent parties, proper subject-matter, sufficient consideration, and consent of minds. This contract was binding upon the state, and could not be violated by its legislation without infringement of the constitution."

Consideration for such contract.

King's Heirs v. *Thompson*, 9 Pet. 219.

"To constitute a valuable consideration, it is not necessary that money should be paid; but if, as in this case (*King's Heirs* v. *Thompson*, 9 Peters, 219), it be expended on the property, on the faith of the contract, it constitutes a valuable consideration."

Von Hoffman v. *Quincy*, 4 Wall. 535.

The case of *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, well illustrates the principle. It was there held that:

"Where a statute has authorized a municipal corporation to issue bonds and to exercise the power of local taxation in order to pay them, and persons have bought and paid value for bonds issued accordingly, the right to the exercise of the power of taxation thus given is a contract within the meaning of the constitution, and can not be withdrawn until the contract is satisfied. The state and the corporation in such a case are equally bound."

In *Walker* v. *Whitehead*, 16 Wall. 314, SWAYNE, J., says:

"The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge, and enforcement."

The opinion of Justice SWAYNE is a clear statement of the result of the whole line of decisions in that Court upon the particular point of the legislative power over the remedy. He says (p. 554):

"It is well settled that a state may disable itself by contract from exercising its taxing power in particular cases. It is equally clear that when a state has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given can not be withdrawn until the contract is satisfied. The state and the corporation in such cases are equally bound. The power given becomes a trust which the donor can not annul and which the donee is bound to execute; and neither the state nor the corporation can any more impair the obligation of the contract in this way than in any other."

So that a sovereign state may not only oblige itself by contract to exempt particular property from the exercise of its taxing power, by contract with individuals, but it may, in like manner, oblige itself that it will ex-

ercise that power in a particular manner for the accomplishment of an agreed purpose.

Gozzler v. *Georgetown*, 6 Wheat. 597.

The case of *Gozzler* v. *Georgetown*, 6 Wheat 597, may seem to be an exception from the otherwise uniform series of decisions of the Supreme Court of the United States upon the subject. That, however, was the case of a municipal corporation, as to which it was decided that the contract relied on was *ultra vires*. The Court say:

Difference between municipal corporation and a foreign state.

"When a *government* enters into a contract, there is no doubt of its power to bind itself to any extent not prohibited by its constitution. A *corporation* can make such contracts only as are allowed by the acts of incorporation. The power of this body to make a contract which should so operate as to bind its legislative capacities forever thereafter, and disable it from enacting a by-law, which the legislature enables it to enact, may well be questioned. We rather think that the corporation can not abridge its own legislative power."

East Hartford v. *Hartford Bridge Co.*, 10 How. 535.

Commenting on this case, in *East Hartford* v. *Hartford Bridge Co.*, 10 How. 535, the Court say:

"This case appears to settle the principle that a legislative body can not part with its powers by any proceeding, so as not to be able to continue the exercise of them. It can and should exercise them, again and again, as often as the public interest requires. *And though private interests may intervene, and these should not be injured except in terms allowed by the constitution*, yet public interests in one place or corporation may be affected injuriously by laws, without any redress, as legislation on public matters looks to the whole and not a part, and may, for the benefit of the whole to the injury of a part, *change what is held under it by public bodies for public purposes*," . . . *Clark* v. *Corporation of Washington*, 12 Wheat. 54. . . . "*There is no private interest or property affected by this course, but only public corporations and public privileges.* It may be

otherwise in case of private bodies or individuals, or of private property granted or acquired. The legislature might not be justified to revoke, transfer, or abolish them on account of the private character of the party or the subject." *Pawlet* v. *Clark*, 9 Cranch, 292; *Terrett* v. *Taylor*, 9 Cranch, 48.

The case rests on the well founded distinction between public and private corporations; between public rights and private.

Vincennes University v. *State of Indiana*, 14 How. 276.

"A state can no more impair by legislation," says the Court, in *Woodruff* v. *Trapnall*, 10 How. 207, "the obligation of its own contracts than it can impair the obligation of the contracts of individuals. We naturally look to the action of a sovereign state to be characterized by a more scrupulous regard to justice and a higher morality than belong to the ordinary transactions of individuals."

Woodruff v. *Trapnall*, 10 How. 207.

To turn a legislative act into a contract, it is, of course, necessary that proprietary rights should have become vested upon the faith of it as such. Otherwise, the permission would be regarded merely as a revocable license, as occurred in the case of *Rundle* v. *Delaware and Raritan Canal Co.*, 14 How. 80. In that case it was held that a proviso in the acts of Pennsylvania and New Jersey, for the improvement of the river Delaware, reserving from the commissioners appointed under them all power to interfere with a mill-dam, previously built, was a revocable license merely, subordinate to the public right, not inconsistent with the right of the State of New Jersey to make a subsequent grant to a canal company which would diminish the supply of water for mill purposes. The ground on which this conclusion is rested appears from the following extract from the opinion, after referring to certain Pennsylvania decisions:

Rundle v. *Delaware and Raritan Canal Co.*, 14 How. 80.

"The principles asserted and established by these cases are, perhaps, somewhat peculiar, but as they affect rights to real property in the State of Pennsylvania, they must be treated as binding precedents in this Court. It is clear, also, from the application of their principles to the construction of the proviso under consideration, that it can not be construed as a grant of the waters of a public river for private use, or a fee simple estate in the usufruct of them 'without diminution or alteration.' It contains no direct words of grant, which would operate by way of estoppel upon the grantor. The dam of Adam Hoops was a nuisance when it was made; but as it did little injury to the navigation, the commissioners who were commanded to prostrate other nuisances were enjoined to tolerate this. *The mills of Hoops had not been erected on the faith of a legislative license*, as in the cases we have quoted, and a total revocation of it would not be chargeable with the apparent hardship and injustice which might be imputed to it in these cases. *His dam continues to be tolerated, and the license of diverting the water to his mills is still enjoyed*, subject to the occasional diminution from the exercise of the superior right of the sovereign. His interest in the water may be said to resemble a right of common, which, by custom, is subservient to the right of the lord of the soil; so that the lord may dig clay pits, or empower others to do so, without leaving sufficient herbage on the common. *Bateson* v. *Green* 5 T. R. 411."

In reference to this case, it is material, also, to remark that the proviso in the provincial act of 1771 relied on, construed as a contract, could not fairly be extended to any thing more than an agreement that the dam should not be disturbed and that the proprietor should not be prohibited from taking water out of the river for the use of the mills; and could not be construed as a warranty that the supply of water should be sufficient for their purposes, so that others should not

have, by similar permission, the right to participate in its use. And the Court are careful to say :

"We do not, therefore, consider the question before us, whether the plaintiff might not recover damages against an individual or private corporation diverting the water of this river to their injury, for the purpose of private emolument only, with or without license, or authority of either of its sovereign owners." P. 93.

Upon this ground the case of *Rundle* v. *Delaware and Raritan Canal Co.* is brought directly within the principle of the decision of the case of *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 420, where it was held that the whole grant to the proprietors of Charles River Bridge consisted in the ordinary faculties of a corporation for the purpose of building a bridge, and taking certain tolls, and did not import any exclusive right of pontage in the vicinity, which brought the state under any engagement that another bridge should not be erected, that by competition might diminish its income. And the franchises which were granted were not impaired. The Court said, p. 548 :

Charles River Bridge v. *Warren Bridge*, 11 Peters, 420.

"The relative position of the Warren Bridge has already been described. It does not interrupt the passage over the Charles River Bridge, nor make the way to it or from it less convenient. None of the faculties or franchises granted to that corporation have been revoked by the legislature, and its right to take the tolls granted by the charter remains unaltered. In short, all the franchises and rights of property enumerated in the charter, and those mentioned to have been granted to it, remain unimpaired."

In *Maryland* v. *B. & O. R. R. Co.*, 3 Howard, 550, it was decided that the repeal of the provision requiring the company to build its road on a prescribed line, or

Maryland v. *B. & O. R. R. Co.*, 3 How. 550.

pay a sum of money to a particular county, was the *remission of a penalty*, and not the violation of a contract, "for in doing this, it (*the legislature*) was dealing altogether with matters of public concern, and interfered with no private right; for neither the commissioners nor the county, nor any one of the citizens, had acquired any separate or private interest which could be maintained in a court of justice."

Objection that contract subject to implied or police power or express power to regulate commerce.

It may be said, however, conceding that the terms of the joint resolution of March 3, 1869, import a contract between the United States and the Newport and Cincinnati Bridge Company, on the faith of which the latter made its expenditure in the construction of the bridge thereby authorized, still it must be considered that one of the necessary, implied conditions of that contract, subject to which are all the plaintiff's rights, is that Congress, invested by the constitution with the power and duty to regulate commerce between the states, was bound, on grounds of public policy, to exercise that authority, from time to time, as the public necessities might demand; and its exercise, in any manner injuriously affecting the interests or rights of the plaintiff, can not be considered a violation of the obligation of the contract.

That is to say, every contract with a sovereign is entered into by him, with an implied reservation on his part of the right to break it, whenever it becomes his interest to do so; but if so, then there is a corresponding obligation, at least, to make proper amends for doing it; or else, the engagements of sovereigns are improperly called contracts, as by the definition they have no obligation.

In the *Wheeling Bridge Case*, 18 Howard, 431, Congress interfered to legalize the structure after a decree of the Supreme Court requiring it to be elevated or abated. This action of Congress was upheld by the Court as furnishing a rule for its decision upon the question of abatement and injunction, on the ground that "the regulation of commerce includes intercourse and navigation and, of course, the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation." But this effect was expressly limited to the future. As to what had passed the Court say:

Wheeling Bridge Case, 18 How. 431.

"Now, we agree if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, *the right to them would have passed beyond the reach of the power of Congress.*" . . . "The decree before us, *so far as it respects the costs adjudged*, stands upon the same principles, and is unaffected by the subsequent law."

To the same effect is the case of *The Clinton Bridge Company*, 10 Wall. 462.

Clinton Bridge Case, 10 Wall. 462.

The right of Congress to establish and change the rule of decision, so as to make lawful for the future what in the past has been unlawful, has been thus affirmed on the incontestable ground that Congress can dispose of *public rights* at discretion; but, at the same time, it has been affirmed in terms to deny its right so to change the rule, as to take away *any private rights of property* which under the previous law had become *fixed*. Congress may change or repeal *a law;* but, as was said by Chief Justice MARSHALL, it can not after *a fact*.

Congress may change rule of decision for the *future*, but not as to the *past;* can not regulate *public rights* so as to take away *private* rights, without compensation.

Prof. LORIMER (Institutes, 211) says:

Lorimer's Inst. 211.

"The abstract formula of legislation plainly is this—*so long*

as and to the full extent to which the facts on which rights of property rest, remain unchanged, these rights are inviolable; but no longer and no further."

U. S. v. *Rice*, 4 Wheat. 254.

This is pertinently illustrated by the case of *The United States* v. *Rice*, 4 Wheat. 254. Castine, having been occupied during the war of 1812 by the enemy, goods were imported into it, under the authority of regulations prescribed by them. After it was evacuated, and the authority of the United States was re-established, it was claimed that on certain goods then remaining, but previously introduced, duties had accrued to the United States, to enforce payment of which suit was brought. The Court said:

"The subsequent evacuation by the enemy, and resumption of authority by the United States, did not and could not change the character of the previous transactions."

Curtis, in *Com.* v. *Alger*, 7 Cush. 61.

The precise point of the argument under consideration is stated, with great clearness and conciseness, by CURTIS, in arguing the case of *Commonwealth* v. *Alger*, 7 Cush. 61. He said:

"There is a class of cases, in which it has been held that the legislature might restrain owners of land from making certain uses of their property, and might authorize acts which caused damage to property, without making compensation. *But these cases do not depend upon any power reserved to the public, to do any thing in conflict with the grant or in derogation of any right acquired by the grant;* but each case turns on the question whether the particular thing done or prohibited was a violation of any right acquired by the grant." Citing *Hollister* v. *Union Co.*, 9 Conn. 436; *Hooker* v. *N. H. & Northampton Co.*, 14 Conn. 146; *Hurley* v. *Lynne*, 9 Bing. 91; *Callender* v. *Marsh*, 1 Pick. 418; *Stackpole* v. *Healy*, 16 Mass. 33.

And this power in the state governments is the same in kind as in the Government of the United States —the political power, so called, the due and lawful exercise of which, by the former, has never been held to constitute a violation of contracts, forbidden by the Federal constitution.

Chief Justice TANEY, in his opinion in the *License cases*, 5 How. 583, said:

What are police powers. *License Cases*, 5 How. 583.

"But what are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, *or to regulate commerce within its own limits*, in every case, it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion."

See the case of the *Philadelphia, Wilmington and Baltimore R. R. Co.* v. *Bowers*, Law Reg. March 1874.

Speaking of the exercise of this power in its relation to grants from the state, Judge COOLEY (Const. Lim. 577) lays down the following rules:

Cooley, Const. Lim. 577.

"The limit to the exercise of the police power in these cases must be this: The regulations must have reference to the comfort, safety, or welfare of society; *they must not be in conflict with any of the provisions of the charter;* and they must not, *under pretense of regulation*, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments to the charter in curtailment of the corporate franchise."

Perhaps the ablest and most complete description and discussion of the nature and limits of this power over private rights, to be found in the literature of our jurisprudence, is contained in the decision of Chief Jus-

Com. v. *Alger*, 7 Cush. 53.

tice SHAW, in the case of the *Commonwealth* v. *Alger*, 7 Cush. 53.

In that case it was decided that—

"The legislature of this commonwealth has power to establish lines in the harbor of Boston, beyond which no wharf shall be extended or maintained, and to declare any wharf extended or maintained beyond such lines a public nuisance; and statutes establishing such lines take away the right of the proprietors of flats in the harbor beyond the lines to build wharves thereon, even when they would be no actual injury to navigation; and such statutes, although they provide for no compensation to such proprietors, are not unconstitutional, as taking private property and appropriating it to public uses without compensation, within the meaning of the Declaration of Rights Act, 10; nor as impairing the obligation of the grant made by the colony ordinance, and thus transgressing the prohibition of the Constitution of the United States, art. 1, § 10, against passing laws impairing the obligation of contracts. *But such statutes do not affect the right to maintain wharves enacted before their passage.* It was held that the colony ordinance of 1641 vested the property of the flats in the owner of the upland in fee, in the nature of a grant; but that it was to be held subject to a general right of the public for navigation until built upon or inclosed, and subject also to the reservation that it should not be built upon or inclosed in such manner as to impede the public right of way over it for boats and vessels." . . . "It is said that it was not of itself a grant, but a general law affecting the character of property. Be it so. It was an authoritative declaration of owners, having a full right of property and power of disposal, annexing additional land to that previously granted, to hold in fee, subject to a reserved easement; *and if not strictly a grant*, it partook of most of the characteristics of a grant, *and could not be revoked by the power that gave it.*"

"But the power of the commonwealth, by the legislature over the sea, its shores, bays, and coves, and all tide waters, is not limited like that of the crown at common law. By the common

law, the king was held to be the owner and proprietor of the soil under the sea, its shores, and all tide waters, and as such could grant the right of property therein to a subject; though this was not usually done without the previous execution and return of a writ of *ad quod damnum* to ascertain whether such grant would cause any injury to any public right. But it was further held at common law that, beyond a right of property, the king's prerogative extended to the dominion and control of the shores of the sea, as a power held in trust for the security and protection of the public rights in the navigation and fisheries; that these were among the regalia or incidents of sovereignty, which could not be alienated by a royal grant alone, or held by a subject. But we believe it was never doubted that the British Parliament, exercising all the powers of dominion and sovereignty, had full authority to regulate, protect, and secure all public rights; and it is under this authority, we suppose, that acts have often been passed regulating ports, harbors, and tide waters. *Lowe* v. *Govett*, 3 B. & Ad. 863; *The King* v. *Montague*, 4 B. & C. 588; *Attorney-General* v. *Burridge*, and *Same* v. *Parmeter*, 10 Price, 350, 378, 412."

"We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an eqaal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the Government and held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations, established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. This is very different from the right of

Com. v. *Alger.*

eminent domain, the right of a government to take and appropriate private property to public use whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor.

"The power we allude to is rather the police power, the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties, or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same.

"It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries, or prescribe limits to its exercise. There are many cases in which such a power is exercised by all well ordered governments, and where its fitness is so obvious that all well-regulated minds will regard it as reasonable. Such are the laws to prohibit the use of warehouses for the storage of gunpowder near habitations or highways; to restrain the height to which wooden buildings may be erected in populous neighborhoods, and require them to be covered with slate, or other incombustible material; to prohibit buildings from being used for hospitals for contagious diseases, or for the carrying on of noxious or offensive trades; to prohibit the raising of a dam and causing stagnant water to spread over meadows near inhabited villages, thereby raising noxious exhalations injurious to health and dangerous to life. Nor does the prohibition of such noxious use of property, a prohibition imposed because such use would be injurious to the public, although it may diminish the profits of the owner, make it any appropriation to a public use, so as to entitle the owner to a compensation. If the owner of a vacant lot in the midst of a city could erect thereon a great wooden building and cover it with shingles, he might obtain a larger profit of his land than if obliged to build of stone or brick, with a slated roof. If the owner of a warehouse, in a cluster of other building, could store quantities of gunpowder in it for himself and others, he might be saved the great expense of transportation. If a landlord could let his building for a small-pox

hospital, or a slaughter house, he might obtain an increased rent. But he is restrained; not because the public have occasion to make the like use, or to make any use of the property, or to take any benefit or profit to themselves from it, but because it would be a noxious use, contrary to the maxim, *sic utere tuo, ut alienum non laedas.* *Com. v. Alger.*

"It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is, therefore, not within the principle of property taken under the right of eminent domain. The distinction, we think, is manifest in principle, although the facts and circumstances of different cases are so various that it is often difficult to decide whether a particular exercise of legislation is properly attributable to the one or the other of these two acknowledged powers."

"Considering, therefore, that all real estate derived from the government is subject to some restraint for the general good, whether such restraint be regarded as a police regulation or of any other character; considering that seashore real estate, though held in fee by the riparian proprietor, both on account of the qualified reservation under which the grant was made, and the peculiar nature and character, position and relations of the estate, and the great public interests associated with it, is more especially subject to some reasonable restraints, in order that the exercise of full dominion over it, by the proprietor, may not be noxious to others and injurious to the public, the Court are of opinion that the legislature has power, by a general law, affecting all riparian proprietors on the same line of shore equally and alike, to make reasonable regulations, declaring the public right and providing for its preservation by reasonable restraints, and to enforce these restraints by suitable penalties. Wherever their is a general right on the part of the public, and a general duty on the part of a land owner, or any other person, to respect such right, we think it is competent for the legislature, by a specific enactment, to prescribe a precise practical rule for declaring, establishing, and securing such right, and enforcing respect for it. It may be said in general terms, independently of any positive enactment, that it is the right of society, in the

Com. v. *Alger.*

midst of a populous settlement, to be exempt from the proximity of dangerous and noxious trades; and that it is the duty of the owner of real estate in the midst of many habitations, to abstain from erecting buildings thereon, or otherwise using it for carrying on a trade dangerous to the lives, health, or comfort of the inhabitants of such dwellings, although a trade in itself useful and beneficial to the public. But such general duty and obligation not being fixed by a rule precise enough for practical purposes, we think it is competent for the legislature to interpose and by a specific enactment to declare what shall be deemed a dangerous or noxious trade, under what circumstances and within what distance of habitations it may or shall not be set up, how the use of it shall be regulated and to prohibit any other than such regulated use by specific penalties."

"This principle of legislation is of great importance and extensive use, and lies at the foundation of most enactments of positive law, which define and punish *mala prohibita*. Things done may or may not be wrong in themselves or necessarily injurious and punishable as such at common law; but laws are passed declaring them offenses and making them punishable, because they tend to injurious consequences; but more especially for the sake of having a definite, known and authoritative rule, which all can understand and obey. In the case already put, of erecting a powder magazine or slaughter house, it would be indictable at common law, and punishable as a nuisance, if, in fact, erected so near an inhabited village as to be actually dangerous or noxious to life and health. Without a positive law, every body might agree that two hundred feet would be too near and that two thousand feet would not be too near; but within this wide margin, who shall say, who can know, what distance shall be too near or otherwise? An authoritive rule, carrying with it the character of certainty and precision, is needed. The tradesman needs to know, before incurring expense, how near he may build his works without violating the law or committing a nuisance; builders of houses need to know to what distance they must keep from the obnoxious works already erected, in order to b esure of the protection of the law for their habitation. This requisite certainty and pre-

cision can only be obtained by a positive enactment, fixing the distance within which the use shall be prohibited as noxious and beyond which it will be allowed, and enforcing the rule thus fixed by penalties.

"Many cases will suggest themselves where the legislature interposes by statute to declare, protect and regulate public rights, although those rights are public easements only, over lands of which the fee of the soil is in private proprietors. Such are laws regulating the construction and repairs of roads, highways, and bridges; declaring how they shall be graded, what barriers shall be erected to guard travelers against dangerous places, and what obstructions shall be removed."

"In regard to the first suggestion, it may be necessary to examine the facts more minutely before any final judgment is entered. If any portion of this erection, described in the indictment, had been actually made and placed in its position before the act was passed, the Court are all of opinion that the owner is not liable to its penalties. These laws were future and prospective in their terms and in their operation. They proceed on the assumption that before they were passed every man had a right to build on his own flats, if the erection did not in fact operate to impede navigation and render him indictable as at common law; and that the common law in thus lending its aid in the prosecution of actual injuries to navigation to be proved in each case as nuisances, would be sufficient to secure the public against encroachment without legislation. But for the reasons hereinbefore given, it seems to us highly important to have a more precise and definite law made and promulgated by which all persons may more certainly know their own and the public rights, and govern themselves accordingly.

"If, indeed, before the passing of these laws any one had so built into navigable waters as to cause a public nuisance, he may be liable to indictment and punishment, but not by these laws fixing harbor lines. It follows, therefore, that all persons who built on their own soil before these laws, in a manner not amounting to a public nuisance, independently of them, had exercised only their just and lawful right; and any laws, made to punish acts

lawful at the time they were done, would be *ex post facto*, contrary to the constitution, and to the plainest principles of justice, and of course inoperative and void."

Bartemeyer v. Iowa, 18 Wall. 129.

In *Bartemeyer* v. *Iowa*, 18 Wall. 129, this Court, in holding that the prohibitory liquor law of Iowa was not in conflict with the fourteenth amendment to the constitution of the United States, although it prohibited the sale of liquor, said:

"But if it were true, and it was fairly presented to us, that the defendant was the owner of the glass of intoxicating liquor which he sold to Hickey, at the time that the State of Iowa first imposed an absolute prohibition on the sale of such liquors, then we concede that two very grave questions would arise, namely: 1. Whether this would be a statute depriving him of his property without due process of law."

Beer Co. v. Mass. 97 U. S. 25.

This question was presented to the Court in the later case of *Beer Co.* v. *Massachusetts*, 97 U. S. 25.

The Beer Company was chartered in 1828, with express authority to manufacture beer in the city of Boston, and implied authority to sell it when manufactured. In 1869, the legislature of the state adopted a prohibitory law, in the enforcement of which certain malt liquors manufactured by the company and held by it for sale, were declared forfeited, and a judicial order for their destruction made. It was claimed that the law of 1828 created a contract, the obligation of which was impaired by the law of 1869. The Court held that the act was a valid exercise of the police power of the state, but said:

"We do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for the public good without due compensation. But we

infer that the liquor in this case, as in the case of *Bartemeyer* v. *Iowa*, 18 Iowa, 129, was not in existence when the liquor law of Massachusetts was passed."

Nor is it to be overlooked that the power of Congress over the subject of bridges over navigable streams is not the police power at all, but is the power to regulate commerce between the states—the "commercial power," as it is called by Justice GRIER in the *Passaic Bridge Case*.

No *implied* reservation because it is *express*.

Whatever extent over the contract may be given to the *implied reservations* of power, the inquiry could only be material in the *absence* of an *express reservation*. Where there is an *express reservation*, the only admissible *implication* is that *nothing is to be implied*. In the present case, Congress has expressed the conditions on which it reserved its right to annul or modify its contract. That is at least to be construed as a contract, that it will not withdraw its assent or exert its power over the subject, except upon the conditions expressed.

Curran v. *Arkansas*, 15 How. 313.

This principle is stated by the Supreme Court of the United States in the case of *Curran* v. *Arkansas*, 15 Howard, 313, as follows:

"Legislative powers over contracts lawfully existing when the contracts are formed affect the nature and enter into the obligations of those contracts. But such powers can be exerted only in the particular cases in reference to which they have been reserved; and they are inoperative in all other cases. And until such a case arises, the obligation of such a contract can no more be impaired than if it were under no circumstances subject to legislative control."

"Not only the general laws in force at the time and place of making a contract enter into and constitute a part of it, but judicial constructions do also; and although erroneous and subse-

quently changed, previous contracts can not thereby be invalidated." *Caldwell* v. *Carrington*, 9 Peters, 103.

"This Court," says Mr. Justice STRONG, in *Olcott* v. *The Supervisors*, 16 Wall. 690, "has always ruled that if a contract when made was valid under the constitution and laws of a state as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature or the judiciary will be regarded by this Court as establishing its invalidity. Such a rule is based upon the highest principles of justice. Parties have a right to contract, and they do contract in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule." *Stavemeyer* v. *Iowa City*, 3 Wall. 294; *Gelpcke* v. *The City of Dubuque*, 1 Wall. 175; *Ohio Life Ins. and Trust Co.* v. *Debolt*, 16 How. 432.

Unconditional reservations limited by necessary implications.

Indeed, even when the power reserved to revoke the grant seems, in terms, to be absolute and unconditional, it is nevertheless limited by necessary implications in favor of private rights, which have become vested.

No equitable construction to divest estates.

In such cases, the rule of interpretation is that:

"A statute shall never have an equitable construction in order to overthrow or divest an estate. Every statute derogatory to the rights of property, or that takes away the estate of a citizen, ought to be construed strictly." *Van Horne's Lessee* v. *Dorrance*, 2 Dall. 316, per PATTERSON, J.

Van Horne's Lessee v. *Dorrance*, 2 Dall. 316.

Same principle applied to *public* corporations.

The power of the legislature over public corporations is plenary, yet they may acquire rights and interests, in their nature, private; and as to such, they are to be regarded and dealt with in the same light as individuals; and grants of property and of franchises, coupled with an interest, to public or political corpora-

tions are beyond legislative control equally with the property of private corporations.

Aberdeen Female Academy v. *Abaen*, 13 Sm. & M. 646.

Bailey v. *New York*, 3 Hill, 541.

St. Louis v. *Russell*, 9 Mo. 507.

Trustees of Schools v. *Trebman*, 13 Ill. 27.

City of Louisville v. *University of Louisville*, 15 B. Monroe, 642.

State v. *Springfield*, 6 Ind. 83.

In *Tomlinson* v. *Jessup*, 15 Wall. 459, it is said: *Tomlinson v. Jessup*, 15 Wall. 459.

"The reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state. Rights acquired by third parties, and which have become vested under the charter, in the legitimate exercise of its powers, stand upon a different footing; but of such rights it is unnecessary to speak here. The state only asserts in the present case the power under the reservation to modify its own contract with the corporators; it does not contend for a power to revoke the contracts of the corporation with other parties, *or to impair any vested rights thereby acquired*."

Mr. Justice CLIFFORD, delivering the judgment of the Court in *Miller* v. *The State*, 15 Wall. 498, says: *Miller v. State*, 15 Wall. 498.

"Power to legislate founded upon such a reservation in a charter to a private corporation, is certainly not without limit, and it may well be admitted that it can not be exercised to take away or destroy rights acquired by virtue of such a charter, and which by a legitimate use of the powers granted have become vested in the corporation, but it may be safely affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant or to secure the due administration of its affairs, so as to protect the rights of

the stockholders and of creditors, and for the proper distribution of the assets. Such a reservation, it is held, will not warrant the legislature in passing laws to change the control of an institution from one religious sect to another, or to divert the fund of the donees to any new use inconsistent with the intent and purpose of the charter, or to compel subscribers to the stock, whose subscription is conditional, to waive any of the conditions of their contract." Citing *Com.* v. *Essex Co.*, 13 Gray, 253; *Miller* v. *Railroad Co.*, 21 Barb. 517; *State* v. *Adams*, 44 Missouri, 570; *Zabriskie* v. *Railroad Co.*, 3 C. E. Green, 180; *Railroad Co.* v. *Veazie*, 39 Maine, 581; *Sage* v. *Dillard*, 15 B. Monroe, 357.

Sinking Fund Cases, 99 U. S. 700.

In *The Sinking Fund cases*, 99 U. S. 700, this Court sustained the act of May 7, 1868, amending the preceding acts relating to the Pacific railroads, and clearly announced the principles upon which the complainant relies in this cause:

The act of 1864 entitled the Government to retain one-half of any and all sums which should accrue to railroad companies from the United States for services rendered to the latter by the former, and apply the same to the payment of the bonds issued by the Government in aid of the construction of said roads. The act of 1864 created a sinking fund, into which the entire amount of all such compensation was required to be paid, to be applied to the payment of the interest and principal of said bonds. The acts of 1862 and 1864, taken together, reserved to the United States the right to "alter, amend, and repeal the" acts; and the Court held that Congress had thus reserved power to "*make such alterations and amendments of the charter as come within the just scope of legislative power.*" And the Chief Justice proceeds to say:

"That this power has a limit no one can doubt. All agree that it can not be used to take away *property* already acquired

under the operation of the charter, or to deprive the corporation of the fruits, actually reduced to possession, of contracts lawfully made; but, as was said by this Court, through Mr. Justice CLIFFORD, in *Miller* v. *The State*, 15 Wall. 498, 'It may safely be affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of stockholders and of creditors, and for the proper disposition of its assets,' and again, in *Holyoke Co.* v. *Lyman*, Id. 519, 'to protect the rights of the public and of the corporators, and to promote the due administration of the affairs of the corporation.'"

Conceding these principles, the majority of the Court sustained the act of 1864 as being such a regulation of the affairs of the corporations in their relations to their creditors as the Government had reserved the right to make. Justices FIELD, STRONG, and BRADLEY, asserting the same principles, held the act to be in conflict with them. We cite, therefore, in support of our views upon this branch of the cause now in hearing, the minority as well as the majority opinions.

And in *Railroad Co.* v. *Maine*, 96 U. S. 511, Mr. Justice FIELD says:

"By the reservation in the law of 1831, the state retained the power to alter it in all particulars constituting the grant to the new company, formed under it, of corporate rights, privileges, and immunities. The existence of the corporation, and its franchises, and immunities, derived directly from the state, were thus kept under its control. Rights and interests acquired by the company, *not constituting a part of the contract of incorporation*, stand upon a different footing."

The complainant did not derive its existence or any of its corporate franchises from the United States.

If it was necessary for it to have the assent of Con-

gress to the erection and maintenance of its bridge; that assent was given, without any reservation other than that contained in the provision that Congress reserved the right to withdraw the assent thus given, if it should appear that the navigation of the river was "*substantially and materially obstructed* by any bridge to be erected," etc.

Power over charters. 1 Am. Law Rev. 469.

A writer in the American Law Review, vol. 1, p. 469, deduces from a review of decided cases, upon this point, the following conclusions:

1. Where an absolute power to alter, amend, or repeal acts of incorporation has been reserved to the legislature, the power to *repeal* is unqualified.

2. It is immaterial whether the reserved power was specifically set forth in the particular charter of the corporation or was at the time the grant was made part of the general statute law of the state.

McLaren v. *Pennington*, 1 Paige, 102.

Crease v. *Babcock*, 23 Pick. 334.

Hicks v. *Hotchkiss*, 7 Johns. Ch. 297.

Blanchard v. *Russell*, 13 Mass. 16.

Ogden v. *Saunders*, 12 Wheat. 213.

3. That all reservations in grants to corporations are to be construed in favor of the state, and that courts will not by implication create contracts favorable to the grantor.

Comm. v. *Bonsall*, 3 Wharton, 559.

Com. v. *Erie & N. E. R. R. Co.*, 29 Penn. 339.

Richmond Ac. R. R. Co. v. *Louisa R. R. Co.*, 13 Howard, 71.

Providence Bank v. *Billings*, 4 Peters, 514.

4. That the legislature is the sole judge within certain limits of the justice or propriety of alterations and amendments to charters; and the courts can not go into consideration of their motives or the equity or policy of such amendments or alterations.

5. The legislature can make no alteration or amendment to any charter, under its renewed power therefor, *which shall impair the obligation of any contract legally entered into by the corporation.*

6. Neither can the legislature make any alteration or amendment by which a corporation is deprived, *without compensation, of its own vested property, or rights of property.*

The following cases are cited and examined:

Allen v. *McKeen*, 1 Summer, 276.

Sage v. *Dillard*, 18 B. Monroe, 340.

Fry v. *Lex. & Big Sandy R. R. Co.*, 2 Metc. (Ky.) 314.

Miller v. *N. Y. & Erie R. R. Co.*, 21 Barb. 513.

Nales v. *Stetson*, 2 Mass. 143.

Miner's Bank v. *United States*, 1 Greene (Iowa), 553.

State v. *Curran*, 7 English (Ark.), 321.

Suydam v. *Moore*, 8 Barb. 358.

Northern R. R. Co. v. *Miller*, 10 Barb. 260.

Perrin v. *Oliver*, 1 Minn. 202.

Erie & N. E. R. R. Co. v. *Casey*, 26 Penn. 287; 1 Grant, 274.

In re Reciprocity Bank, 22 N. Y. 9.

Sherman v. *Smith*, 1 Black, 587.

Roxbury v. *Boston & Prov. R. R.*, 6 Cush. 424.

Bangor, Oldtown and Milford R. R. Co. v. *Smith*, 47 Maine, 34.
Delaware R. R. Co. v. *Tharp*, 5 Harr. (Del.), 454.
Mass. Gen'l. Hospital v. *State Mut. Life Ins. Co.*, 4 Gray, 227.
Comm. v. *Essex Co.*, 13 Gray, 239.
Durfee v. *Old Colony and Fall River R. R. Co.*, 5 Allen, 230.
Read v. *Frankfort Bank*, 23 Maine, 318.
Mumma v. *Potomac Co.*, 8 Peters, 281.
Therfe v. *Rutland and Burlington R. R. Co.*, 27 Vt. 140.

The power of courts over their records during the term is plenary (*Bassett* v. *The U. S.*, 9 Wall. 38), but it can not be exercised so as, in effect, to punish a man twice for the same offense.

Ex parte Lange, 18 Wall. 163.

The doctrine on this subject has been elaborately treated in a series of cases decided by the Supreme Judicial Court of Massachusetts, having special pertinency to the present case. One of the leading cases of this series is that of the *Commonwealth* v. *Essex Company*, 13 Gray, 239, in which it was decided that the Essex Company having made and maintained a fishway in their dam across the Merrimac river, to the satisfaction of the county commissioners, as required by their charter, and having duly accepted the act of 1848, C. 295, authorizing them to increase their capital stock on condition that they should be liable for all damages occasioned by their dam to the owners of fish rights above it, and

Com. v. *Essex Co.*, 13 Gray, 239.

having paid large sums of money for such damages, can not afterwards be required by the legislature, in the exercise of their power to regulate fisheries, to make different fishways, notwithstanding the Rev. Sts., ch. 44, § 23, reserving to the legislature the right to amend, alter, or repeal charters.

The judgment was delivered by Chief Justice SHAW. He said (p. 253):

"The rule to be extracted is this: *That when, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legislative exercise of the powers granted.*" Repeal can not take away vested rights.

He concluds that:

"It was not competent for the legislature, *without any change of circumstances*, under their authority to amend and alter the charter of the company, to pass a law requiring them to do the acts from which, by the terms of such contract, they had been exempted." Must be *change of circumstances.*

["So a particular use of property may some times be forbidden, when, *by a change of circumstances*, and without the fault of the owner, that which was once lawful, proper, and unobjectionable, has now become a public nuisance, endangering the public health or the public safety." *Cooley, Const. Lim.*, 595; *Miller* v. *Craig*, 3 Stockt. 175.]

In the later case of *Comm'rs of Inland Fisheries* v. *Holyoke Water Power Co.*, 104 Mass. 446, it was said: *Com'rs Inland Fisheries* v. *Holyoke Water Power Co.*, 104 Mass. 446.

"The extent of power reserved by such an enactment has been the subject of some diversity of judicial opinion, and a definition of the extreme limit is not necessary to this case. It is sufficient now to say that it is established by adjudications which we can not disregard, and the principles of which we fully approve, that it at least reserves to the legislature the authority to

make any alteration or amendment in a charter granted subject to it, *that will not defeat or substantially impair the object of the grant, or any rights which have vested under it*, and that the legislature may deem necessary to secure either that object or other public or private rights."

Distinguishing the circumstances of this case from those in the case of the Essex Company, last referred to, the Court continues (p. 456):

"But in the case at bar, it not only appears that there are fishing rights below, which are injured by the dam, and for the injury to which no compensation has ever been made or provided, but no fishway whatever has been constructed; and the legislature has never, before passing the statute now sought to be enforced, exercised the power of defining what fishway the defendants should make; nor has it ever authorized or approved, by any expression or implication, the construction or maintenance of a dam without a fishway. In all these respects, this case differs from that of the Essex Company."

The judgment of the state court in this case was reviewed and affirmed on error in the Supreme Court of the United States.

Holyoke Company v. *Lyman*, 15 Wallace, 500.

Ibid. *Holyoke Co* v. *Lyman*, 15 Wall. 500.

CLIFFORD, J., said (p. 522):

"Such charters *being subject to the implied condition* to construct suitable fishways for the free passage of fish, it follows that the corporations are not exempt from that burden, and that the legislature, *under the reserved power* to amend, alter, or repeal the charter, may pass laws to enforce that duty, as such a law *does not impair any contract* created by the charter, *or infringe any right vested in the corporation*." . . .

"Power to legislate, founded upon such a reservation, is certainly not without limit, but it may safely be affirmed that it reserves to the legislature the authority to make any alteration or amendment in a charter granted, subject to it, *that will not de-*

feat or substantially impair the object of the grant, or any rights which have vested under it, which the legislature may deem necessary to secure either the object of the grant, or any other public right not expressly granted away by the charter."

"*Vested rights, it is conceded*," says the Court, p. 519, "*can not be destroyed or impaired under such a reserved power.*"

Such are the limits upon the legislative power, as prescribed by judicial decisions based upon the primary principles of the law, even where the reservation is plenary and unconditional.

But in the present case the reservation is limited still more by its terms.

Reservation in this case limited in its own terms.

The declaration of the joint resolution of March 3, 1869, is,

"but Congress reserves the right to withdraw the assent hereby given [or to direct the necessary modifications and alterations of said bridge] in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this resolution."

Under this reservation we claim :

1. That before Congress was authorized to exert this reserved power at all, it was necessary that the authorized bridge should have been actually erected, and that it should have been shown to be, as matter of experienced fact, a substantial and material obstruction to the free navigation of the river ; *and that by reason of a change in circumstances subsequently occurring.*

1. Reserved power not to be exercised till after bridge built.

2. That the determination of the question whether this contingency had happened involved the inquiry, first, what constitutes a substantial and material obstruction to navigation ; and, second, whether the bridge as erected came within that description ; and that both

2. Question of obstruction judicial, and not competent for congress to decide.

these inquiries involve the exercise of judicial power, which it was not competent for Congress to assume.

3. At least, its decision not conclusive.

3. That, at least, the action of Congress can only be justified by proof of the facts referred to, and in this action it can be sustained only by such a finding. And, consequently, that, as the bill alleges the fact to be otherwise, and there is no proof to the contrary, it must be held to be a case for compensation, as provided by the statute.

This is the meaning of the language.

The construction claimed for this reservation is the obvious one suggested by the plain and natural meaning of the words. The right reserved is to withdraw the assent given, in case a certain described, definite fact shall take place, which can not be ascertained to have actually taken place until after the bridge shall have been completely finished; because the bridge must be completely built before any one can say that it has substantially and materially obstructed the free navigation of the river. In advance of its completion it would be competent for any one to express an *opinion or belief* that it will or will not, when completed, prove to be such an obstruction; and such an *opinion or belief*, based upon a knowledge of the plan and dimensions of the structure and the circumstances of the locality, may be more or less probably true, and may in fact, if the event so turns out, be verified by it. But however probable or correct such an opinion or belief might be, *the fact* could not occur and be accomplished until the *actual obstruction* had taken place.

Must have been the intention of the parties.

This is not only the plain reading of the joint resolution, but the only intention that can be imputed to the parties, having regard to the purpose they must have had in view.

The only rational purpose that can be assumed is, that it was the intention of Congress, by prescribing the character of the bridge to be erected, and declaring such an one, when built, to be a lawful structure, to relieve the bridge company from the peril of making an investment of a large amount, upon its own judgment, which might by a judicial decree be declared to be lost in a bridge shown to be a public nuisance, occasioning special damage to a party complaining; at the same time reserving, from considerations of the public and private interests involved in the navigation of the river, such control over the subject, that, in case it should, after experience of the fact or after a change in circumstances not then capable of accurate anticipation and appreciation, be found to be a substantial and material obstruction to the navigation of the river, Congress might, without being charged with violating the faith of its contract, place the company in the position in which it would have been, in case it had originally built its bridge without any assent from the United States.

Otherwise, reservation inconsistent with the grant.

If any construction less favorable to the rights of the company than this is placed upon the reservation, it is difficult to state what benefit was conferred by giving the assent: for, although it does not immediately retract the assent just given, the reservation retains the right to recall it, at any moment, and without cause. And yet it must be supposed that some benefit was intended.

If it be said that the intended exercise of the reserved right was to be dependent upon the *opinion* of Congress from time to time, that does not help the matter; because it is still left without rule or guide to

the arbitrary will of the legislative body; and at any rate, it must be an *opinion* formed *after* and not *before* the happening of the *fact*, which it is intended to characterize—that is, it must be a declared opinion that the *completed* bridge *had* substantially and materially obstructed navigation, and not that, if permitted to go on to completion, it *would* do so.

Eastern Archipelago Co. v. The Queen, 2 Ell. & Bl. 870.

In the case of the *Eastern Archipelago Company* v. *The Queen*, 2 Ell. & Bl. 870, MARTIN, B., said:

"It seems to me that this is the consequence which the law attaches to misuser or abuse of a charter, and *that the crown could not legally grant a charter with a proviso, that in the event of a misuser or abuse, it should be reserved to the crown, of itself only, to revoke or make void the grant either absolutely or upon terms.*"

PARKE, B.:

"The crown clearly means to reserve to itself, *not the power of determining whether there has been a breach or not in point of fact* on the part of the company, *for that must be proved as a matter of fact*, but whether, in case there has been a breach, it would be fit to avoid the charter altogether or only upon terms and conditions."

JERVIS, C. J.:

"I say 'perhaps,' because *I doubt whether, under any circumstances, a charter under the great seal can be revoked by writing under the sign manual;* and I see many coustitutional reasons which might be urged against the existence of such a power uncontrolled to the crown."

Washington Bridge Co. v. The State, 18 Conn. 53.

In the case of the *Washington Bridge Company* v. *The State*, 18 Conn. 53, the original charter of the company fixed the width of the draw in the bridge, and reserved to the legislature power to regulate the bridge

and tolls only in the event, which had not come to pass, of the corporation having been reimbursed the moneys expended in building the bridge, with interest thereon at the rate of twelve per cent. annually. A subsequent act of the legislature required a draw of greater width, which was held to be a violation of the contract contained in the original act.

See also

Hartford Bridge Co. v. *East Hartford*, 16 Conn. 149; 17 Conn. 79; 10 How. 511.

English v. *N. H. & Northampton Co.*, 32 Conn. 240.

Woodman v. *Kilbourn Man. Co.* 6 Am. Law Reg., N. S., 238.

The case of *Woodman* v. *The Kilbourn Manufacturing Company*, in the Circuit Court of the United States for the District of Wisconsin, decided by MILLER, District Judge, and reported in 6 Am. Law. Reg. N. S. 238, was an application for an injunction to restrain the defendants from constructing a dam in the Wisconsin river. This they were proceeding to do, under the authority of an act of the state legislature, giving power to the company to create water-power by building a dam, "not exceeding three feet above the usual low water mark in the Wisconsin river, *and so forming the same that rafts of lumber can pass safely and conveniently, without hindrance or delay.*"

In refusing the injunction, the judge said (p. 244):

"The bill complains of a prospective abridgment of complainants' right to the free navigation of the river. It has not been injured by the dam at present in process of construction. Defendants must be allowed a reasonable time to construct the dam, not exceeding three feet in height above low water mark,

and in such form as rafts of lumber can pass safely and conveniently without hindrance or delay, according to the act. The work can not be restrained by injunction, upon the theory that no dam can be constructed at that point that will not obstruct the navigable use of the river. The legislature have authorized defendants *to make the experiment* if a dam can be constructed as required by the act, and the Court will permit the practical test to be applied. If the speculations of complainants' bill should be realized, and defendants' efforts prove unsuccessful, the dam will have to be abated at their costs. Mere theoretical opinions are not sufficient in law for enjoining the progress of a work in the nature of a public improvement authorized by a legislative act."

Crease v. Babcock, 23 Pick. 344.

In *Crease* v. *Babcock*, 23 Pick. 344, MORTON, J., says:

"If any man or body of men is invested with power to do a certain act upon the occurrence of a certain event, when the event happens they have a right to perform the act, and the most that can be urged against it is, that if it be exercised before the event happens, it is void. And this is true by whomsoever the fact is to be ascertained."

Com. v. New Bedford Bridge, 2 Gray, 339.

"The case of the *Commonwealth* v. *New Bedford Bridge*, 2 Gray, 339, was an indictment for a nuisance occasioned by the erection and maintenance of a bridge obstructing the navigation of the Acushnet, a navigable river.

The following extract from the judgment of the Court, delivered by C. J. BIGELOW, is precisely in point upon the question under immediate discussion.

He said (p. 347):

"But the main ground on which the commonwealth relies to sustain the present indictment is the failure of the defendants to comply with the provisions of statute of 1851, c. 318, by which they are required to construct and maintain, in their bridge across

the channel of the river, a draw of not less than sixty feet in width. The defendants admit that they have not constructed a draw in compliance with this legislative requirement, and rest their defense to this part of the case on the unconstitutionality and invalidity of the act by which this duty is imposed upon them. To determine this question, it is necessary to recur to the original act incorporating the defendants, St. 1796, c. 19. There can be no doubt as to the legal relations created by this act between the government and the defendant corporation. On the part of the former, it was a grant, in consideration of the expected benefit to the public, of the right to construct and maintain a bridge over navigable waters, to be built in the place and mode, and of the size and materials specified in the act; on the part of the latter, it was a stipulation in consideration of the right to take the toll by the act created and established, to erect and support a bridge across the river, according to the terms and conditions, and of the kind and dimensions in the act set forth and described. Upon familiar and well settled principles, the act, when accepted by the defendants, was an executed contract between them and the government, by the terms of which, as contained in the charter, both parties are equally bound. The defendants can not, without the consent of the legislature, escape or evade any of the duties or obligations imposed upon or assumed by them under the act; nor can the legislature, without the assent of the defendants, in any way affect or impair the original terms or the charter by annexing new conditions or imposing additional duties, onerous in their nature, or inconsistent with a reasonable construction of the compact. Angell & Ames on Corp., §§ 31, 82, 767, and cases cited; *Wales* v. *Stetson*, 2 Mass. 146; *Nichols* v. *Bertram*, 3 Pick. 342; *Boston and Lowell Railroad* v. *Salem and Lowell Railroad*, *ante*, 30.

"(4.) We are, then, brought directly to the question whether the defendants are bound to comply with the provisions of St. 1851, c. 318, by which they are required to enact and maintain a new draw in their bridge across the channel of the river, to be built of the size and in the manner therein specified; and are liable to indictment solely for a neglect and refusal to carry its

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requisitions into effect. Applying to the original charter of the defendants, as we are bound to do, the ordinary rules regulating the interpretation and construction of contracts, it will be found that the extent of the duty imposed on them, respecting the erection and construction of the draws over the channel of the river, is clearly set out and defined. They are to erect 'suitable draws, which shall be at least thirty feet wide;' that is, the minimum width of the draws is prescribed. In all other respects—in their construction, materials, dimensions, and operation—they are to be adapted to the locality in which they are to be erected, and to the wants and necessities of those who may have occasion from time to time to use them for the purpose of navigating the river above and below the bridge. The corporation could not legally make either draw less than thirty feet wide; they were not bound to make it of greater width, unless the convenience and accommodation of the public, having occasion to pass the bridge, or to navigate the river, rendered its enlargement proper and necessary. These are the terms and conditions prescribed by the legislature, on the subject of the erection and maintenance of the draws over the channel, upon the faith of which the defendants accepted the charter, assumed the duties imposed by it on them, and expended their money in the construction of the bridge. No power to amend or change the charter was reserved to the legislature. The respective rights and duties of the parties to the contract must therefore be determined solely by its original provisions. Tried by this test, there can be no doubt that the St. of 1851, c. 318, imposes new and additional burdens on the defendants not contemplated by their act of incorporation. It raises the minimum width prescribed for the draw over the channel from thirty to sixty feet; it requires the defendants to make and maintain a new draw, in lieu of the one then existing, to be not less than sixty feet in width; and to remove the westerly abutment thereof to a point eight feet further to the eastward than the westerly abutment of the existing draw; and directs that this draw shall be constructed within six months from the passage of the act, in such manner as shall be approved by a commissioner to be appointed for the purpose by the governor, the expense of such commissioner to be paid by the corpo-

ration. It certainly requires no argument to prove that these requirements are of an onerous character, and that they materially change the nature of the structure, which the defendants were required to erect by their original charter. Indeed, this is not denied by the learned counsel for the commonwealth. But it is urged that this constitutes the stress of the argument on this part of the case, that the use of the term 'suitable' in the act incorporating the defendants, as applied to the construction of the draws, being a term in its nature indefinite and uncertain, did not fix and absolutely settle the duty and obligation of the defendants in this particular; that these, with the exception of the minimum width of the draw, were thereby left open and undetermined, and by necessary implication the legislature have the right reserved to them of regulating from time to time the construction of the draws, and of prescribing what shall be suitable, as respects their location, materials, and dimensions. But we can not yield to the force of this argument. It is founded on an entire misapprehension of the relations of the parties, as created by the act of incorporation. They are but parties to a contract. Each has equal rights and privileges under it, and neither can interpret its terms authoritatively, so as to control and bind the rights of the other. The commonwealth has no more power or authority to construe the charter, than the corporation. By becoming a party to a contract with its citizens, the government divests itself of its sovereignty with respect to the terms and conditions of the compact, and its construction and interpretation, and stands in the same position as a private individual. If it were otherwise, the rights of parties contracting with the government would be held at the caprice of the sovereign and exposed to all the risks arising from the corrupt or ill-judged use of misguided power. The interpretation and construction of contracts when drawn in question between the parties, belongs exclusively to the judicial department of the government. The legislature have no more power to construe their own contracts with their citizens than those which individuals make with each other. They can do neither without exercising judicial power, which would be contrary to the elementary principles of our govern-

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ment, as set forth in the Declaration of Rights, art. 30. No better illustration of the dangerous consequences which would follow from a different doctrine could be had than is afforded by the case at bar. If the legislature have the power to decide upon the true meaning of the terms of the contract, and to determine what shall be deemed suitable in the construction of the bridge and draws, there can be no limit placed upon the exercise of this power. If they have the right to prescribe a draw of sixty feet in width, they may hereafter require the defendants to extend it to one hundred feet, or to build it across the entire space between the shore and the adjacent islands. So, too, in regard to the construction of the bridge itself. The act of incorporation required that it should 'be well built, at least twenty-four feet wide, of good and suitable materials.' By parity of reasoning, it would be competent for the legislature to enact that the bridge should be rebuilt one hundred feet in width, and be constructed of iron. In a word, the argument leads directly to the conclusion that the legislature have the power to annex new and onerous conditions to the contract, at their pleasure, and thus effectually destroy the value of the franchise granted to the defendants. Such a doctrine can not be maintained without overthrowing all the salutary and well-established principles applicable to this species of contract between the government and its citizens. For these reasons, we are of opinion that the act of 1851, c. 318, *ex proprio vigore*, has no binding force upon the defendants, and that this indictment can not be sustained against them upon proof of a neglect and refusal to comply with its requisitions.

"But it by no means follows that the defendants are not liable to prosecution, if they have failed to fulfill the duty imposed upon them by the original charter, with respect to the construction of the draws in their bridge. If the legislature have no power to determine absolutely what is suitable in this particular, neither have the defendants. We can not assent to the argument urged upon us in their behalf, that, by the true interpretation of the original act, the defendants were bound only to erect a bridge with draws which were suitable and adapted to the accommodation of navigation on the river, at the time of their construction, and that

be '*without due process of law*.' This is forbidden by the fundamental principles of the social compact, and *is beyond the sphere of the legislative authority, both of the state and the nation*."

In *Ames* v. *Port Huron Log Driving and Booming Company*, 11 Mich. 147, the Supreme Court of Michigan said:

Ames v. Port Huron Log Driving and Booming Co, 11 Mich 147.

"Except in those cases where proceedings to collect the public revenue may stand upon a peculiar footing of their own, it is an inflexible principle of constitutional right that no person can be legally divested of his property without remuneration or against his will, unless he is allowed a hearing before an impartial tribunal, where he may contest the claim set up against him and be allowed to meet it on the law and the facts. When his property is wanted *in specie* for public purposes, there are methods assured to him whereby its value can be ascertained. Where a debt or penalty or forfeiture may be set up against him, the determination of his liability becomes a judicial question; and all judicial functions are required by the constitution to be exercised by courts of justice or judicial officers regularly chosen. He can only be reached through the forms of law upon a regular hearing, unless he has by contract referred the matter to another mode of determination."

In *Palairet's Appeal*, 67 Penn. St. 479, it was decided by the Supreme Court of Pennsylvania that an act of the legislature providing for the extinction of irredeemable ground rents, by compulsory sale, without the consent of the owner, was unconstitutional.

5 Am. Rep. 430; *Palairet's Appeal*, 67 Penn. St. 479.

Judge SHARSWOOD said:

"The remaining position to be considered is, that the constitutionality of this act can and ought to be sustained under the general power of the legislature to regulate property and to modify its incidents. But while it is true that this power is unlimited as to all future acquisitions by persons natural or artificial, the cases

and precedents already referred to abundantly show that wherever the operation and effect of any general regulation is to extinguish or destroy that which by the law of the land is the property of any person, so far as it has that effect, it is unconstitutional and void. Every power which the legislature possesses is subject to the prohibitions contained in the declaration of rights, and one of them, as we have seen, is, that they can not take the property of a man, except for public use, without his consent. Perhaps no more apposite illustration of this is to be found than in the case of rights and titles acquired under statutes of limitations. 'Suppose,' said Mr. Justice ROGERS, in *McCabe* v. *Emerson*, 6 Harris, 112, 'after titles acquired to a tract of land by the act of limitations, the legislature should extend the time, or suppose a writ of error barred by a lapse of time, would any person contend that the legislature would have a constitutional authority to interfere so as to affect rights thus acquired? This will scarcely be pretended.'" *Ervine's Appeal*, 4 Harris, 356; *Boggs' Appeal*, 7 Wright, 512; *Billings* v. *Hall*, 7 Cal. 1; *Knox* v. *Cleveland*, 13 Wis. 245; *Alters' Appeal*, 67 Penn. St. 341; 5 Am. Rep. 433.

Wynehamer v. The People, 13 N. Y. 378.

In the case of *Wynehamer* v. *The People*, 13 N. Y. 378, it was decided that the provisions of the act to prevent intemperance (Laws of 1855, p. 340) substantially destroy the property in intoxicating liquors owned and possessed by persons within the state, when the act took effect; that in its application to such liquors so owned and possessed, the act violates the provision of the state constitution, which declares that no person shall be deprived of life, liberty, or property without the process of law.

"The true interpretation of these constitutional phrases," says COMSTOCK, J. (p. 393), "is that *where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away; but when they are held contrary to the existing law, or are forfeited by its*

violation, then they may be taken from him—not by an act of the legislature, but in the due administration of the law itself, before the judicial tribunals of the state." . . .

"It is plain, therefore, both upon principle and authority, that these constitutional safeguards, in all cases, require a judicial investigation, *not to be governed by a law specially enacted to take away and destroy existing rights*, but confined to the question, *whether, under the pre-existing rule of conduct, the right in controversy has been lawfully acquired and is lawfully possessed.*" . . .

"When a law annihilates the value of property, and strips it of its attributes by which alone it is distinguished as property, the owner of it is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended expressly to shield private rights from the exercise of arbitrary power."

To the same effect, see *Darst* v. *The People*, 51 Ill. 286. 2 *Am. Rep.* 301.

Also—

East Kingston v. *Towle*, 48 N. H. 174. 2 *Am. Rep.* 174.

Piscataqua Bridge v. *Portsmouth Bridge*, 7 N. H. 35.

Jones v. *Robbins*, 8 Gray, 342.

Green v. *Briggs*, 1 Curt. C. C. 311.

Parsons v. *Russell*, 11 Mich. 113.

Fisher v. *McGirr*, 1 Gray, 27.

Parsons v. *Pettingell*, 11 Allen, 512.

Salem v. *Eastern R. R. Co.*, 98 Mass. 443.

Blair v. *Forehand*, 100 Mass. 136, proceeds on the ground that the right of property in dogs is not "*absolute and valuable.*" 1 *Am. Rep.* 94.

A forfeiture without notice to the owner of the property and without an opportunity of being heard on

the question of the owner's culpability, is contrary to the provision in the bill of rights, that no one shall be deprived of his property unless by the judgment of his peers or the law of the land. *Craig* v. *Kline*, 65 Penn. St. 399.

Craig v. *Kline*, 65 Penn. St. 399. 3 *Am. Rep.* 636.

Stanley v *Colt*, 5 Wall. 168, was a case of the *exercise by the legislature of Connecticut of* JUDICIAL *power, which, by the state constitution, it was lawful for it to do.*

Stanley v. *Colt*, 5 Wall. 168.

In the case of the *United States* v. *Union Pacific R. R. Co. et al.*, in the Circuit Court of the United States for the District of Connecticut, reported in 8 Am. Law Rev. 356, Justice HUNT held an act of Congress to be unconstitutional because it purported to transfer to the United States rights of action which had vested in the corporation, notwithstanding the corporation was created by acts of Congress expressly subject to alteration, amendment, or repeal. He said:

U. S. v. *Union Pacific R. R. Co*, 8 Am. Law Rev. 356; s. c., 98 U. S. 569.

"The United States can not convert to itself the property of another by its own declaration or its own authority; nor can it maintain an action in its own name against A. to recover a debt which he may owe to B." . . . "Congress can not thus appropriate to itself what belongs to another. To give effect to such an act would be to deprive one of his property without due process of law. I do not doubt the power of Congress over the remedy to redress alleged injuries; in other words, its power to regulate the conduct of suits or to prescribe the form of actions. But it can not, under the form of regulating the remedy, impair contracts or dispose of rights of property. It can not itself adjudge that moneys are due to the United States, and by such judgment give authority for their collection."

An expository act of assembly is destitute of retroactive force, because it is an act of judicial power, and is in contravention of the ninth section of the ninth ar-

ticle of the constitution, which declares that no man can be deprived of his property "unless by the judgment of his peers, or the law of the land."

SHARSWOOD, J., in

Haley v. *Philadelphia*, 68 Penn. St. 45. 8 Am. Law Rep. 153.

O'Conner v. *Warner*, 4 W. & S. 223.

Lambertson v. *Hogan*, 2 Barr, 25.

Greenough v. *Greenough*, 11 Penn. St. 495.

Reiser v. *Wm. Tell Saving Fund Association*, 39 Penn. St. 137.

People v. *Supervisors of New York*, 16 N. Y. 424.

Dash v. *Van Kleck*, 7 Johns. 498.

Governor v. *Porter*, 5 Humph. 165.

Cooley's Const. Lim. 93.

State ex rel. McCurdy v. *Tappan*, 29 Wis. 664. 9 Am. Law Rep. 622.

In this connection, the case of *Cooper* v. *Board of Works of Wandsworth District*, 14 Com. Bench, N. S. 180, is important and interesting. *Cooper* v. *Board of Works for Wandsworth District*, 14 C. B., N. S., 180

The 76th section of the Metropolis Local Management Act, 18 & 19 Vict. C. 120, empowers the district board *to alter or demolish a house*, when the builder has neglected to give notice of his intention to build seven days before proceeding to lay or dig the foundation. It was held that this does not empower them to demolish the building without first giving the party guilty of the omission an opportunity of being heard; and that the 211th section, which gives an appeal to the Metropolitan Board of Works, does not prevent the builder or owner of the premises from suing them for so doing.

ERLE, C. J., said (p. 188):

"It has been said that the principle that no man shall be deprived of his property without an opportunity of being heard is limited to a judicial proceeding, and that a district board ordering a house to be pulled down can not be said to be doing a judicial act. I do not quite agree to that; neither do I undertake to rest my judgment solely on the ground that the district board is a court exercising judicial discretion upon this point; but the law, I think, has been applied to many exercises of power which in common understanding would not be at all more a judicial proceeding than would be the act of the district board in ordering a house to be pulled down."

BYLES, J., said (p. 194):

"It seems to me that the board are wrong whether they acted judicially or ministerially. I conceive they acted judicially, because they had to determine the offense, and they had to apportion the punishment, as well as the remedy. That being so, a long course of decisions, beginning with Dr. Bentley's case (1 Strange, 557; 2 Ld. Raymond, 1334; 8 Mod. 148; Fortescue, 202), and ending with some very recent cases, established that although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature. The judgment of Mr. Justice Fortescue in Dr. Bentley's case is somewhat quaint, but it is very applicable and has been the law from that time to the present. He says: 'The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defense, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defense. "Adam," says God, "where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat."' And the same question was put to Eve also.'" *King* v. *Chancellor, etc., of Cambridge* (Dr. Bentley's case), 1 Str. 557; *King* v. *Burns*, 1 T. R. 198; *Harper* v. *Carr*, 7 T. R. 270; *Capel* v. *Child*, 2 C. & J. 558; *Hammond* v. *Bundyshe*, 13 Q. B. 869; *Painter* v. *Liverpool Oil Gas Light*

Co., 3 Ad. & E. 433; 6 N. & M. 736; *Hammersmith Rent Charge Case*, 4 Excheq. 87; *Tinkler* v. *Wandsworth Dist. Board*, 27 Law J., Ch. 342.

In the case of the *Hammersmith Rent Charge*, 4 Excheq. 96, BANON PARKE said: 4 *Hammersmith Rent Charge*, 4 Excheq. 96.

"In *Capel* v. *Child*, BAYLEY, B., says that he knows 'of no case in which you are to have a judicial proceeding by which a man is to be deprived of any part of his property without his having an opportunity to be heard.' And accordingly, though the late statute on which that case depended, the 57 Geo. 3, c. 99. § 50, authorized a bishop, whenever it should appear to his satisfaction, either *of his own knowledge*, or upon proof by affidavit, that, by an incumbent's negligence the spiritual duties were inadequately performed, to require him to appoint a curate, and in default to appoint one with a salary, the court of exchequer held that the established principle must prevail, and that the Bishop of London could not proceed without a summons to the incumbent, *although he acted on his own knowledge*. This is an extremely strong case and shows how powerful the principle of justice is, in all judicial proceedings; *quicumque aliquid statuerit, parte inaudita, altera, aequum licet statuerit, haud aequus fuerit.*"

It may, however, be said, as was said by the Supreme Judicial Court of Massachusetts, in *Crease* v. *Babcock*, 23 Pick. 344, that: *Crease* v. *Babcock*, 23 Pick. 344.

"The inquiring into the affairs or defaults of a corporation with a view to continue or discontinue it," is not a judicial act; that "it is the duty of the legislature to inquire and ascertain whether existing facts render their action expedient or necessary;" that "it is indispensable that this inquiry should, in the first instance, be made by the legislature. No other body can do it for them. They have restricted themselves from exercising the power of repeal until a certain event happens. This they must necessarily ascertain before they can properly exercise the power. Their

decision must, *prima facie*, be presumed to be right. Whether it be conclusive or not is a question not necessary now to determine."

To this we reply:

1. In the language of the same authority:

"If any man, or body of men, is invested with power to do a certain act, upon the occasion of a certain event," . . . "if it be exercised before the event happens, it is void." (P. 344).

2. According to the reasoning and illustrations of Judge CURTIS in the case of *Murray's Lessee* v. *Hoboken Land and Improvement Company*, 18 Howard, 283, that when the Government has resorted to extra judicial remedies, to which it was entitled upon the *existence of certain facts*, and has acted upon the assumption of their existence, and permitted itself to be sued for the alleged injury resulting from its procedure, it thereby authorizes the existence of these facts to be put in issue and judicially determined.

3. That in this case the fact is shown to be, that at the time the act of March 3, 1871, was passed, the bridge had not been completed, and therefore had not become a material and substantial obstruction to the navigation of the river; and that from the time of the passage of the joint resolution of March 3, 1869, there had been no change in the circumstances affecting the question.

4. That the question of the rightfulness of the rescinding act, so far as private rights are affected, is necessarily *judicial*.

Erie & N. E. R. R. Co. v. Casey, 2 Casey, 287; *Com. v. Penn. Canal*

It was so held by the Supreme Court of Pennsylvania in the case of the *Commonwealth* v. *Pittsburg and Connellsville R. R. Co.*, 58 Penn. St. (8 P. F. Smith) 46.

This question was decided by the late Justice

GRIER in the case of *Baltimore* v. *The Connellsville, etc., Railroad Company*, in the Circuit Court of the United States for the Western District of Pennsylvania, reported 4 Am. Law Reg. (N. S.) 750.

Co., 66 Penn. St. 41. *Baltimore* v. *Connellsville, etc., R. R. Co.*, 4 Am. Law Reg., N. S., 750.

The charter of the Pittsburgh and Connellsville Railroad Company contained the following provision, viz:

"*If the said company shall at any time misuse or abuse any of the privileges herein granted, the legislature may resume all and singular the rights and privileges hereby granted to such corporation.*"

Under this clause the legislature, by an act passed in 1864, revoked and resumed all and singular the rights and privileges granted to said company, so far as the same authorized it to construct any line southwardly or eastwardly from Connellsville.

It was held that:

"When the right to revoke was only in case the corporation should misuse or abuse its privileges, *the fact* of such misuse if denied by the corporation should be established by competent proceedings, and that an act declaring a revocation without the establishment of such fact was unconstitutional."

Justice GRIER said:

"If in the act of incorporation the legislature retains the absolute and unconditional power of revocation for any or no reasons; if it be so written in the bond, the party accepting a franchise on such conditions can not complain if it be arbitrarily revoked; or if this contract be that the legislature may repeal the act whenever in its opinion the corporation has misused or abused its privileges, then the contract constitutes the legislature the arbiter and judge of the existence of that fact.

"But the case before us comes within another category. The

contract does not give an unconditional right to the legislature to repudiate its contract, *nor is the legislature constituted the tribunal to adjudge the question of fact as to the misuse or abuse.*

"Moreover, the case before us admits that the condition of facts upon which the legislature are authorized to repeal the act does not exist. It admits that the corporation has neither 'misused or abused its privileges.' A charter may be vacated by the decree of a judicial tribunal in a proper proceeding for that purpose, without any such reservation in the act. Then both parties are heard and a verdict of a jury on the facts can be obtained, which concludes the question. But the legislature possesses no judicial authority under the constitution, and has no established course of proceedings in the exercise of such power." . . .

"When, in a case like the present, the legislature are asked to take the property of one corporation and give it up to another on the ground that one has abused or misused its privileges, the just and proper mode would be to pass a resolution ordering the attorney-general to institute the proper legal proceeding to ascertain the fact of 'misuse or abuse.' If such issue be found true then that the charter be revoked or resumed. We do not say that without such judicial proceeding ascertaining the existence of the condition in which the right of repeal is reserved the act is absolutely void; but we do say, that in all such cases the party injured, if he denies the existence of such 'misuse or abuse,' has a right to be heard and to have that question tried before he shall surrender his property or his franchise."

Erie & N. E. R. R. Co. v. Casey, 26 *Penn. St.* (1 Grant) 275.

See opinion of LEWIS, C. J., in *Erie & N. E. R. R. Co.* v. *Casey*, 25 Penn. St. (1 Grant) 275.

U. S. v. *Repentigny*, 5 Wall. 267.

In the case of the *United States* v. *Repentigny*, 5 Wall. 267, the Supreme Court stated the law upon the point as follows:

"The United States succeeded to all the rights to this territory that existed in the King of France, under the treaty of 1783 with Great Britain, at the close of the Revolution. The United States then became the lord paramount of this seigniory, and were thereby invested with the power to deal with the seigniorial

estate the same as the King of France, had it continued under his dominion; *and we agree that before a forfeiture or reunion with the public domain could take place, a judicial inquiry should be instituted, or, in the technical language of the common law, office found, or its legal equivalent.* A legislative act directing the possession and appropriation of the land is equivalent to office found. The mode of asserting or of assuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government, without these preliminary proceedings. (*Fairfax* v. *Hunter*, 7 Cranch, 603; *Smith* v. *Maryland*, 6 Cranch, 286.) In the present instance we have seen the laws have been extended over this tract, the lands surveyed and put on sale, and confirmed to the occupants or purchasers, *and in the meantime, an opportunity given to all settlers and claimants to come in before a board of commissioners and exhibit their claims. This is a legislative equivalent for the reunion by office found.*"

In the case of the *Flint and Prestonville Plank Road Co.* v. *Woodhull*, 25 Mich. 99, it was decided by the Supreme Court of Michigan, in a very able opinion delivered by Judge COOLEY, that where the charter of a corporation contained a provision that it should not be repealed "unless it shall be made to appear to the legislature that there has been a violation by the company of some of the provisions of this act," such violation must be made to appear by the judgment of a court, and could not be adjudged by the legislature.

This Court, in the case of *Farnsworth et al.* v. *Minn. & Pac. R. R. Co.*, 92 U. S. 49, affirmed the doctrine in *United States* v. *Repentigny*, 5 Wall. 211, and in *Schulenberg* v. *Harriman*, 21 Wall. 44, that a legislative act declaring a forfeiture was equivalent to office found,

but with the important qualification contained in the following sentence. On page 67, the Court say:

"The only inconvenience resulting from any mode other than by judicial proceedings is, that the forfeiture is thus left open to legal contestation when the property is claimed under it, as in this case, against the original holders."

In other words, the finding is not conclusive, as in a judicial proceeding; but the facts on which it can legally rest may be drawn in question in any subsequent judicial proceeding.

The disability imposed upon state governments, whereby they are incapable of passing laws impairing the obligation of contracts, does not originate in the provision of the constitution of the United States prohibiting it, but in the general principles of liberty and justice, which, either expressly or by implication, are contained in the state constitutions, because they necessarily flow from the nature of free and just government as conceived by our people. The same principle limits the power of the Government of the United States in the same respect and to the same degree. In the case of *Rice* v. *Minnesota and Northwestern Railroad Company*, 1 Black, 358, the Supreme Court of the United States said (p. 373):

"If the defendants acquired such a right, title, or interest in the lands, under their original charter, then it is clear that it became a vested interest as soon as the act of Congress went into effect; and on that state of the case, it would be true, as contended by the defendants, that the repealing act set up in the replication of the plaintiff is void and of no effect." Citing *Terret* v. *Taylor*, 9 Cranch, 43; *Pawlet* v. *Clark*, 9 Cranch, 202.

And again (p. 374):

"If the legal effect of the act of Congress set up in the answer was to grant to the territory a beneficial interest in the lands, then it is equally clear that it was not competent for Congress to pass the repealing act and divest the title."

Act of March 3, 1871, was the taking of private property for public use without just compensation.

In the next place, we claim that the operation of the act of Congress of March 3, 1871, forbidding the prosecution of work on the bridge and prohibiting its use as unlawful, violated the rights of the plaintiff as secured by that provision of the fifth amendment to the constitution, which declares, "*nor shall private property be taken for public use without just compensation.*"

The Supreme Court of the United States has had repeated occasion to declare that this constitutional provision is intended as a limitation on the exercise of power by the Government of the United States.

Baron v. *Baltimore*, 9 Peters, 243.
Fox v. *Ohio*, 5 Howard, 411.
West River Bridge Co. v. *Dix*, 6 Howard, 507.
Withers v. *Buckley*, 20 Howard, 89.

So that, although the act in question may fall clearly within the authority of Congress, as an exercise of some express power, nevertheless if it has the effect of taking private property for public use without compensation, it is prohibited by this provision of the constitution.

The state can not interfere with vested rights for the purpose of protecting any public interest, without compensation.

Stevens v. *Middlesex Canal*, 12 Mass. 466.
Gardner v. *Newburgh*, 2 Johns. Ch. 162.

Boston and Roxbury Mill Corp. v. *Newman*, 12 Pick. 467.

Hooker v. *New Haven and Northampton Co.*, 14 Conn. 146.

It was also decided by the Supreme Court, in *Mitchell* v. *Harmony*, 13 Howard, 134, that when the Government, in an emergency, takes private property to its own use, a contract to reimburse the owner arises by implication of law.

U. S. v. *Russell*, 13 Wall. 623.

Speaking to this point, the Court, in the *United States* v. *Russell*, 13 Wall. 623, say:

"Such a taking of private property by the government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity is imperative and immediate, and the danger as heretofore described is impending, and it is equally clear that the taking of such property under such circumstances *creates an obligation on the part of the government to reimburse the owner to the full value of the service.* Private rights must give way for the time to the public good, but the government must make full restitution for the sacrifice."

The only question then is, whether this is a case in which private property has been taken for a public use, within the meaning of the constitutional provision.

People v. *Platt*, 17 Johns. 195.

The early and leading case of *The People* v. *Platt*, 17 Johns. 195, is directly in point. It was there held, in a case the circumstances of which, as to that question, are altogether similar to this, that this constitutional prohibition extends not only to the soil, but also to every incidental right essential to its enjoyment. SPENCER, C. J., said (p. 215):

"The acts in question do not profess to render the grant to

Zephaniah Platt null and void; but if judgment should pass against the defendant on the ground that his dam is a public nuisance, it would become the duty of the Court to adjudge that the nuisance be abated; and thus the grant under which the defendant holds would be manifestly impaired, inasmuch as he would be prohibited the use and enjoyment of a valuable and essential part of it."

In *Crenshaw* v. *Slate River Co.*, 6 Randolph, 264, it was held that

Crenshaw v. *Slate River Co.*, 6 Randolph, 264.

"after a mill has been established, and a dam erected *according to law*, whereby the use of the water for grinding has been granted to the mill owner, a subsequent act of assembly which imposes on him the burden of erecting locks through his dam, of keeping the locks in repair, and of giving attendance at the locks so as to admit the passage of boats, and on his failure vests in a company the power to abate the draw as a nuisance, without full indemnification and equivalent for the injury thus done to his vested rights, is contrary to the constitution of the state, and void,"

as a taking of private property for a public use without compensation.

"It is not necessary," says Mr. Angell (on Watercourses, § 465*a*), "that land should be absolutely *taken*, but any serious interruption to its common and necessary use is equivalent to the *taking* of it; so that, if a corporation is created by the legislature for the purpose of constructing and maintaining a canal, if no compensation is made or provided for a discharge of the water from the canal upon the lands of others, they are entitled in an action on the case to recover damages for an injury sustained by such discharge." Citing *Hooker* v. *N. H. & Northampton Co.*, 14 Conn. 146; S. C., 15 Conn. 313; *Gardner* v. *Newburgh*, 2 Johns. Ch. 162; *March* v. *Portsmouth and Concord R. R.*, 19 N. H. 372; *Rowe* v. *Granite Bridge Corp.*, 21 Pick. 344.

Angell on Watercourses, § 465*a*.

This statement of the rule has received the express

sanction of the Supreme Court of the United States in the case of *Pumpelly* v. *Green Bay Co.*, 13 Wall. 177. Mr. Justice MILLER, delivering the opinion of the Court, said (p. 177):

Pumpelly v. *Green Bay Co.*, 13 Wall. 177.

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent—can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." . . .

"But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. ANGELL in his work on Watercourses, equivalent to the taking of it, and that under the constitutional provisions, it is not necessary that the land should be absolutely taken." . . .

"We are not unaware of the numerous cases in the state courts in which the doctrine has been successfully invoked, that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers, and other highways for the public good, there is no redress; and we do not deny that the principle is a sound one in its proper application to many injuries to property so originating." . . .

"But we are of opinion that the decisions referred to have gone to the *uttermost limit* of sound judicial construction in favor of this principle, *and in some cases beyond it*, and that it remains true that when real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, *it is a taking* within the meaning of the constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle."

See the opinion of the Supreme Court of New Hampshire in the case of *Eaton* v. *Boston, Concord and Montreal Railroad Co.*, 51 N. H. 504, where it was held that the cutting through a ridge near the plaintiff's land, whereby it was subjected to overflow from occasional freshets, was taking his property, for which compensation must be made.

The decisions of the Supreme Court of Ohio upon the question referred to in this opinion, are in perfect harmony with the rule as announced by the Supreme Court of the United States, and in contrast with those of some other states, do not come within the scope of its censure. In *Crawford* v. *Delaware*, 7 Ohio St. 459, the law in that state was established that

Crawford v. *Delaware*, 7 O. S. 459.

"where the owner of a lot builds upon and improves his lot in good faith, with reference to an established grade of a street, and the grade of such street is afterward so changed by the corporate authorities, as that the property of such owner is thereby substantially injured, such grading would be wrongful, so far as to render the corporation liable to make compensation for such injuries." *McCombs* v. *Akron*, 15 Ohio, 474; *Akron* v. *McCombs*, 18 Ohio, 229; *Street Railway* v. *Cumminsville*, 14 Ohio St. 523; *Cincinnati* v. *Penny*, 22 Ohio St. 499.

And the doctrine is based on the idea that the right acquired in the permanence of the legislation is a *property right*. "This easement," it is said in *Crawford* v. *Delaware*, 459, "appendant to the lots, unlike any right of one lot-owner in the lot of another, *is as much property as the lot itself*."

Street Railway v. *Cumminsville*, 14 O. S. 547.

And in *Street Railway* v. *Cumminsville*, 14 Ohio St. 547, Judge RANNEY said:

"But when the public has taken possession, and regularly defined the interests and improvements necessary for its uses, by establishing grades, etc., lot-owners have the right to assume this exercise of authority as a final decision of the wants of the public, and to make their improvements in reference to it. If any mistake is made, it is the mistake of the public authorities, and it can not be corrected at the expense of those who have acted and expended their money upon the faith of its being final. This action on their part is, in legal effect, a distinct and appreciable division of the easement belonging to the public and under its exclusive control, from that belonging to the owner of the lot, and incident to the lawful and beneficial enjoyment of his property." . . . "If, in the progress of improvement, the interests of the public require theirs to be enlarged and his diminished, it can only be done upon making him compensation to the extent of his injury."

Morgan v. *King*, 35 N. Y. 454.

The same principle is asserted by the Court of Appeals of New York in the case of *Morgan* v. *King*, 35 N. Y. 454, in which it was held that a statute declaring a private stream on which riparian owners have vested interests a public highway, without providing compensation to the owners, is null and void. The Court say:

"The act of 1850 declares the river a public highway for the purpose of floating logs and lumber from the foot of Racket lake to the mouth of the river, but it was passed subsequently to the

construction of the defendant's dam and boom, and it does not provide compensation for taking the private property of the owners of the banks and bed of the stream. If, prior to the passage of the act, the stream was private in use or in property, the legislature could not take away the rights of those who were the riparian owners, nor subject such rights to a public use created or authorized by the act itself, without compensation." (p. 459.)

In *Gunn* v. *Barry*, 15 Wall. 622, application was made of the same principle in reference to a change in an exemption law made after the lien of a judgment had taken effect. The opinion of the Court was delivered by Mr. Justice SWAYNE, who said: *Gunn* v. *Barry*, 15 Wall. 622.

"But the act reaches further. It withdraws the land from the lien of the judgment, and thus destroys a vested right of property which the creditor had acquired in the pursuit of the remedy to which he was entitled by the law as it stood when the judgment was recovered. It is, in effect, taking one person's property and giving it to another without compensation. This is contrary to reason and justice, and to the fundamental principles of the social compact. *Calder* v. *Bull*, 3 Dall. 388."

In the *Legal Tender Cases*, 12 Wall. 551, the legal tender acts were said by the Court not to be prohibited by the fifth amendment, which forbids taking private property for public use without just compensation or due process of law, because *Legal Tender Cases*, 12 Wall. 551.

"that provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals."

This distinction is, of course, to be borne in mind. It is the same that lies at the foundation of the doctrine of *remote* and *proximate* cause in all its varied ap-

plications in the law. In the present case, there is no room for such a question; for, if it falls within the principle of an appropriation of private property, the injury was *direct* and not merely *incidental*.

Act of March 3, 1871, an *ex post facto* law.

We also claim that the act of March 3, 1871, prohibiting the completion of the bridge, and its subsequent use as unlawful, violated the rights of the plaintiff as secured by the ninth section of the first article of the contitution, which says:

"No bill of attainder or *ex post facto* law shall be passed."

It is not the intention to review the original controversy upon this clause, whether an *ex post facto* law, covered retrospective civil laws, or criminal laws merely.

"Assuming this construction of the constitutional provision to be correct," says Judge COOLEY (Const. Lim. 266)—"and it has been accepted and followed as correct by the courts ever since—it would seem that little need be said relative to the first, second, and fourth classes of *ex post facto* laws, as enumerated in the opinion quoted. It is not essential, however, to render a law invalid on the grounds that it should expressly assume the action to which it relates to be criminal, or provide for its punishment on that ground. If it shall subject an individual to a pecuniary penalty for an act, which, when done, involved no responsibility (*Falconer* v. *Campbell*, 2 McLean, 212), or if it deprives a party of any valuable right—like the right to follow a lawful calling—for acts which were innocent or at least not punishable by law when committed (*Cummings* v. *Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333), the law will be *ex post facto* in the constitutional sense, notwithstanding it does not in terms declare the acts to which the penalty is attached, criminal." *State* v. *Keith*, 63 N. C. 140; *In re. Murphy*, 1 Woolw., 141.

In *Cummings* v. *Missouri*, 4 Wall. 325, the Court say: *Cummings* v. *Missouri*, 4 Wall. 325.

"The constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised."

"Such a law," says C. J. MARSHALL, in *Fletcher* v. *Peck*, 6 Cr. 137, "may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is, then, prohibited from passing a law by which a man's estate or any part of it shall be seized for a crime which was not declared by some previous law to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words, for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual, in the form of a law annulling the title by which he holds the estate? The Court can perceive no sufficient grounds for making this distinction. This rescinding act would have the effect of an *ex post facto* law." *Fletcher* v. *Peck*, 6 Cr. 137.

In *Ex parte Garland*, 5 Wall. 378, it was decided that attorneys and counsellors *Ex parte Garland*, 5 Wall. 378.

"hold their office during good behavior, and can only be deprived of it for misconduct, ascertained and declared by the judgment of the court, after opportunity to be heard has been afforded."

In *Price* v. *Carskadon*, 16 Wall. 234, it was held that a statute depriving the defendant of certain civil rights, for acts to which such deprivation was not previously affixed by law as a punishment, came within the inhibition of the constitution against the passage of an *ex post facto* law. *Price* v. *Carskadon*, 16 Wall. 234.

The application of these statements of the law to the facts of the present case, are obvious.

Prior to the passage of the joint resolution of March 3, 1869, the plaintiff under its charter from Kentucky and Ohio, had lawful authority to build its bridge, provided when built it had not created a public nuisance, with the right, in case of complaint, to test the question in a proper judicial forum. The joint resolution of that date, established the bridge proposed as a lawful structure, subject only to the condition that if experience should demonstrate that the obstruction caused by it to the navigation of the river was substantial and material, Congress might, in its discretion, withdraw from it the protection of its positive and express sanction, and uncover it again to the peril, to which it would have been exposed, had it been built without the sanction of the joint resolution. There was previously in force no law of the United States, or commercial regulation, which prohibited the erection of that particular bridge at that place, or of one of that particular description. Whether it would or would not fall within the class of prohibited obstructions would depend upon questions of law and of fact, to be examined and determined judicially. Congress, then, by the passage of the act of March 3, 1871, prescribed a new rule for that determination. It specifically prohibited the very structure in progress from being completed and declared it to be, out and out, an illegal obstruction and a public nuisance. It made its mere existence an offense, which was not so before; it assumed its illegality without proof, and by its mere declaration, made that illegal and punishable, which, *we have the right to say*, was not so before; for it was not, except upon proof of facts, the existence of which we deny; and the condemnation

which was pronounced, *was by a change in the law*, and *not upon a finding of facts*.

The creation of an obstruction in a navigable river is in its nature an offense against the public. It is the subject of an indictment at common law. It is punishable penally through the administration of the criminal code in most of the states. It might be made, as to rivers, subject to the regulation for purposes of commerce by the United States an offense punishable in its courts, if Congress had so enacted.

United States v. *New Bedford Bridge*, 1 Wood. & Min. 401.

U. S. v. *New Bedford Bridge*, 1 Wood & Min. 401.

In the case of the *City of Georgetown* v. *The Alexandria Canal Co.*, 12 Pet. 97, it is said:

City of Georgetown v. *Alexandria Canal Co.*, 12 Pet. 97.

"Were it ever admitted that the canal company had exceeded the authority under which they were acting, nevertheless, as the Potomac river is a navigable stream, a part of the *jus publicum*, any obstruction to its navigation would, upon the most established principles, be what is declared by law to be a *public nuisance*. A public nuisance being the subject of criminal jurisdiction, the ordinary and regular proceeding at law is by indictment, or information, by which the nuisance may be abated; and the person who caused it may be punished. If any particular individual shall have sustained special damage from the erection of it, he may maintain a private action for such special damage; because to that extent he has suffered beyond his portion of injury, in common with the community at large."

"Besides this remedy at law, it is now settled that a court of equity may take jurisdiction in cases of public nuisance, by an information filed by the attorney-general." . . . "The court of equity, also, pursuing the analogy of the law, that a party may maintain a private action for *special damage*, even in case of a public nuisance, will now take jurisdiction in case of a public nuisance at the instance of a private person, when he is in imminent danger of suffering a special injury, for which, under the

circumstances of the case, the law would not afford an adequate remedy." See *Attorney-General* v. *New Jersey Railroad and Transportation Co.*, 2 Green (N. J.), Ch. 136.

But no law of Congress had created such an offense or authorized a prosecution to abate it, either by indictment or information, or by bill of equity at the suit of the Government. It could only be at the suit of a private citizen, seeking its abatement, on the ground of its beirg a public nuisance indeed, but also, and equally because it had occasioned a private and special injury to him.

"The private right to damages or to the removal, arises out of the unlawful interference with the enjoyment of the public right, which, as we have seen, is under regulation of Congress." *Wheeling Bridge Case*, 18 How. 431.

The passage of the act of March 3, 1871, made the bridge, so far as erected, subject to abatement as a public nuisance at the suit of any private person showing his legal interest in the question, without any proof whatever of the fact of obstruction to navigation; and so made that punishable, at least in another mode and to a different extent, which, at the time it took place, was not punishable at all, or at least not in the manner and to the extent subsequently provided.

So far we have proceeded to show that the plaintiff's right to maintain this suit is supported upon strict principles of constitutional law, without aid from the broader consideration of a *natural* as distinguished from a *technical* equity. We think we are entitled to what ever measure of relief the circumstances of the case require, upon the broadest principles of natural justice and right. Admitting, then, for the purpose of this view, that Con-

gress had full power and authority, not merely to withdraw its assent, previously given to the construction of the bridge, but to prohibit it after it was nearly completed, as a public nuisance to be abated; and that in doing so, it did not violate the terms of a technical contract, it did not appropriate the property of the plaintiff to the public use, it did not take the plaintiff's property without due process of law, it did not confiscate its property by the operation of an *ex post facto* law, still, what remains?

Relying upon the continuance and permanence of a permission, which, if it meant any thing at all, meant that it should be acted upon, precisely as the plaintiff acted upon it, it made an investment of a large amount of money, partly for the public good and partly for private profit, in the expectation, justly entertained, that it would be allowed, without interruption, to use and enjoy what was thus created; and that, if afterward it should appear that Congress in acting for the Nation, had mistaken the public interests, and that in the discharge of its trust, in the protection and promotion of the public interests, it was necessary to sacrifice in whole or in part the interests of the plaintiff, the latter should not be required to bear all the consequences of a fault not its own. It is resolved into a simple question of good faith, and that universal justice, applicable to all persons in all relations, prescribes to the Government, as well as to private persons and subjects, *sic utere tuo, ut alienum non laedas.*

STANLEY MATTHEWS,
WM. M. RAMSEY.

In the Supreme Court of the United States.

OCTOBER TERM, 1880.

THE NEWPORT AND CINCINNATI BRIDGE Company, appellants, *vs.* THE UNITED STATES. } No. 229.

BRIEF FOR THE UNITED STATES.

This is a suit in equity brought by the company against the United States, by virtue of permission given in the fifth section of the act of 1871, chap. 121 (3d March), 16 Stat., 572, *and Record, p.* 112.

At that date the company was constructing a bridge across the Ohio River at Cincinnati (having a channel-span of about 75 feet *headway* above low water, and a *draw* in another span), under authority from the States of Ohio and Kentucky, and consent by Congress by resolution of March 3, 1869, 15 Stat., 347, *and Record, p.* 109. Thereupon the above act of 1871 forbade farther proceedings in such construction, *unless the channel span should have thereunder a clear headway at low water of* 100 *feet*, &c. (with leave to omit the *draw*); and then the act

further gave to the company a right to file a bill in equity against the United States to determine, first, whether the bridge as theretofore in process of construction substantially complied with the provisions of law relating thereto, and, second, the liability of the United States, if any, to the company, by reason of the above changes; and jurisdiction was conferred upon the court to determine the amount of damages, and to give a decree, &c., with a right of appeal; payment to be made only after a final decree in the Supreme Court of the United States.

A bill was filed accordingly (March 7, 1873), and at the hearing below, April, 1878, the court found, first, that the bridge in process of construction at and before March 3, 1871, did substantially comply with the provisions of law relating thereto; but, second, that the equity of the case is with the United States, who are not liable to the complainant on account of the matters and things alleged in the bill.

The bill set forth, in detail, first, the legislation under which the company was chartered and authorized to erect a bridge; second, the plan of such bridge, and the contract for its erection at the price of $1,110,186.88; third, the amount of work done at the time of the passage of the act of March 3, 1871, viz, $807,435.41; fourth, the cost of the changes required by that act, viz, $557,450.48; fifth, that the bridge as being erected prior to March 3, 1871, was in substantial compliance with the requirements of law, and if it had been completed would not have been a substantial and material obstruction to navigation; and "that all the facts respecting said navigation and affecting the question of the probable amount

of obstruction to the same by the construction of said bridge on said plan, were well known at the time of the passage of said joint resolution [giving consent by Congress], and the said question was not affected by any facts coming to exist or be known subsequently thereto," &c.

The bill was amended in order to vary certain statements in regard to one item of increased cost, viz, the amount due to Smith & Co., contractors for masonry, which was $206,658.53.

After certain demurrers had been passed upon, the United States *answered*, (1) that the original contract for the bridge, made on or about October 9, 1868, called for a *channel span* of 300 feet wide and 103 *feet high* above low-water mark; that the matter was brought before Congress at the next session upon objection by persons navigating the river to the *width* of such span, (the above *height* being again asserted by the company as that which they intended, and being insisted on by the other side); whereupon, such height not being in dispute, Congress fixed the *span* at 400 feet, in other respects referring the matter to the act of 1862, chap. 167 (July 14), 12 Stat., 559, and Record, p. 107; (2) that Congress intended by the above provision that the *channel* under the above span should be 400 feet in width, but that the company by building the piers of the bridge *at an angle* to the current, and also by placing ripraps at their base, has reduced such width to 350 feet; and, (3) as regards the amount due to Smith & Co., objecting thereto amongst other things, the circumstance that a suit brought therefor by Smith & Co. against the Bridge Company had been settled by a payment of $95,000 with an agree-

ment that the Bridge Company should not be liable for anything farther excepting to the extent that *they* might recover the same in their suit against the United States. Record, pp. 20, &c., 26, &c.

The *evidence* shows that:—

I. The original plan of the bridge (September, 1868, and before), provided for a channel span of 100 feet in height or thereabouts. (*Wilson*, answers 57 to 66, pp. 40, &c.; *Linville*, answers 6, &c., pp. 117, &c., answers 23 to 35, pp. 120, &c., and contract with *Franciscus* "according to *the plans* and specifications following," &c., p. 135; and also *Wilson*, pp. 124, &c.).

II. The company resolved to change this in December, 1868, for the plan under which it operated until March 3, 1871. (*Linville*, answer 34, p. 122, and answer 40, p. 128.)

III. This change was notified to the engineer in March, 1869. (*Wilson*, answers 64, 71, 81, 85, &c., pp. 40, 42, 44, &c.)

IV. The resolution giving the consent of Congress was introduced 9th February, 1869. (See *Globe*, 1868–'9, part 2, p. 1028.)

V. The passage of the resolution was advocated by agents of the company upon the ground that the channel span would be 100 feet in height. (*Eggleston*, p. 205; *Moorhead*, p. 206, and *Cary*, p. 208.)

A. *The statute under which this suit is brought creates no new principle of obligation upon the part of the United States because of their dealings about this bridge.* (United States *v.* Union Pacific Co., 98 U. S., pp. 606, &c.) The

remedial character of the statute is confined to the provision giving *jurisdiction* of any contention which this company might make, but as to any foundation for such contention the statute *ex abundanti cautela*, expressly refers that to the law then existing—"if any there be," p. 113.

The act (Record, p. 112) first declares "it unlawful to proceed in the erection of the bridge now being constructed" [no channel span then existing, Exhibit 1, opposite p. 198] unless, among other things, the channel span shall have a clear headway at low water of 100 feet. It then provides that if the company shall make such changes they may file their bill in equity against the United States in the circuit court, &c., &c., and such court shall have jurisdiction to determine, "first, whether the bridge, according to the plans on which it has progressed at the passage of this act, has been constructed so as to substantially comply with the provisions of law relating thereto; and, second, the liability of the United States, if any there be, to the said company, by reason of the changes by this act required to be made."

When Congress gave its assent to the erection of the bridge in question it expressly reserved "the right to withdraw the assent hereby given in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this resolution, or to direct the necessary modifications and alterations of said bridge." From this language it plainly appears that Congress did not intend to invest the company with any of the rights of the public, but merely to express an opinion, for the

present, that such a bridge would not interfere with those rights, retaining *the cause*, as it were, "for further directions."

This reservation was therefore not that of a right to deal with the bridge under the law of *eminent domain* (West River Bridge *v.* Dix, 6 How., 507), but was an express and solemn notice of the peculiar function which Congress possesses in relation to commerce and navigation; a function recognized by the court in the memorable *Wheeling Bridge case*, as reported 18 Howard, 421; and recently again, in the case of *South Carolina v. Georgia*, 93 U. S. 4; *i. e.*, that "the power of Congress to regulate commerce includes the regulation of intercourse and navigation, and consequently the power to determine what shall or shall not be deemed, *in judgment of law*, an obstruction of navigation."

If therefore Congress had confined itself in the act of 1872 to a declaration that the contemplated bridge was *unlawful*, no ground would have been afforded, because of the previous *consent*, for a suit for damages against the United States.

There might, in such case, have been more or less ground for thinking the first act a *miscarriage*, but the ground for *damages* would have been no greater than in case some *court judgment* in 1869 had decided the bridge as contemplated to be *lawful*, whilst another in 1872 had determined the contrary. In both of its above declarations Congress acted as a GRAND INQUEST, and in the second instance was under the highest of obligations to pass upon the question involved (*nuisance or not*), upon general principles, unfettered by any casual *verdict* to the contrary recorded in a quasi private statute, and *found ex parte*, as it were, in the interest of a

party soliciting the legislation. That the Constitution has conferred this jurisdiction of passing "judgment of law" as to the existence of such obstructions upon *Congress* instead of *the courts*, makes no change in the principle that the public is not answerable in damages for the *miscarriages* of officials whilst exercising any *discretion* with which they are invested.

That *Congress*, at the end of a series of statutes (several, suppose, upon each side of some such question), might exercise the *bounty* of the United States towards an innocent suffering party, and reimburse his losses, is not denied, and does not militate against the above proposition, which is, *that such a claim is not* JUSTICIABLE, *because it involves considerations, suitable for the legislative department it may be, but such as a court is, in the nature of things, incompetent to pass upon;* the *actor* in the present case has no *right;* or, to refer to the language of the statues of 1872, *although the court has been given statutory jurisdiction over the persons of the defendants, justiciable "liability" upon their part, i. e., practically, liability of any sort, does not exist.*

Even as respects the bounty of Congress, it seems that in no case could a company situated as is this one properly claim compensation beyond the difference, if any, between the actual cost of the bridge at its final elevation and what it would have cost at that elevation, if such had been the original requirement of the resolution of 1869. *For, that the bridge ought never to have been less than* 100 *feet high must be taken for granted; such being the "judgment of law" in the case.*

Upon the whole therefore, as Congress has referred the claim of the company *to a court*, accompanied by a

judgment to the effect that the bridge assented to in 1869 was *unlawful*, it is apprehended that such tribunal, regarding the matter as it must with judicial faculties only, will hold this to be a case for applying the doctrine that *no damages are due for abating a public nuisance;* it being a matter of no importance whether such abatement were by abandoning the bridge altogether, or by raising its height; *the particular kind of abatement (ex gr., raising the height of the bridge) being in the option of the company, and therefore giving, in itself, no special right to damages.*

B. It is submitted, that Congress in fixing the width of the channel-span intended that substantially there should be a *water-way* in the channel of 400 feet in width. Something of course was to be allowed for such slope of the piers as workmen might pronounce necessary, but it was not allowable to compensate a bad foundation (Merrill, p. 203, ans. 26, &c.) by *ripraps* sensibly diminishing the water-way; and so, also, the piers were not to make such an angle with the current as sensibly to contract that *way*. In the present instance the combined effect of these causes was to contract the channel to a width of about 348 feet. (*Merrill*, answers 7 and 23, pp. 198 and 203.)

C. It is submitted further that the promoters of the resolution of 1869 did not act with that *bona fides* in dealing with Congress which their position called for.

Whether upon the whole the resolution be *public* or *private*, upon the point now under consideration it is subject to observation as if private.

It incorporates provisions as to height—only under reference *by title* to a previous special statute. Legislation of like class is regarded in recent Constitutions as vicious, and so is prohibited, for the reason that members of the legislature are not thereby sufficiently advised of their own action. (Cooley, Const., 183.) The present instance is an illustration of this: the common presumption that naturally such is the consequence being expressly affirmed by the testimony of three members of Congress, one of whom, *Mr. Cary*, had charge of the resolution in the House. (*Globe*, 1868–'69, part 3, p. 1809.) They say that it was asserted by the agent of the company that the height of the channel span was to be 100 feet or over; that this point was a material one with those who, having interests opposed to the bridge, finally withdrew their opposition; and that but for such assertion the consent of Congress would not have been given. (Record, pp. 205, 206, 208.)

It seems that the beneficiaries under this resolution cannot get rid of their *moral* obligation to make the height 100 feet by sheltering themselves under a reference upon the face of the resolution to the provisions of a previous statute (mentioned by title only) which in certain instances had allowed of a height of 70 feet. At all events, a disregard of such obligation is fatal to a suit, like the present, *in equity!* The situation indeed reminds one of the passage in *Blackstone*, to the effect that a private statute "hath been relieved against, when obtained upon fraudulent suggestions." (Comm. 2d, 346.)

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if they continued to maintain them, with the same materials, dimensions, and mode of operation with which they were originally built, the duty imposed on them by the terms of their charter was fully complied with. We think the scope and purpose of the act were much broader, and that it was framed with a wise forecast to meet future exigencies. In granting to the defendants the right to build a bridge over a navigable stream, and thereby to create a partial obstruction to the freedom of the public in passing over it, the legislature intends to provide as far as possible against any serious interruption, present or future, to the passage of vessels, so long as the defendants should continue to maintain their structure. They did not intend, therefore, to fix and limit the dimensions of the draws by the necessities of the public navigation upon the river at that early period, but by requiring that they should be "suitable" they imposed on the defendants the duty of adapting them to the passage of such vessels as in the progress of time and the advancement of commercial intercourse might have occasion to navigate the river above and below the bridge. It is not the duty of the defendants merely to make their draws of a width not less than a certain *minimum* fixed by the act, as was the case in *Commonwealth* v. *Breed*, 4 Pick. 460, but they are also required to construct them so that they may be from time to time "suitable" for the convenient navigation of the river. If, therefore, by reason of the increase in the size of vessels, or of a difference in their mode of construction, or from any other cause, it has become necessary to the convenient passage of the river, that the draws of the bridge should be enlarged, the defendants are bound to adapt them to the present exigencies of the public navigation; and if they fail to do so, they violate the duty imposed on them by the terms of their charter, and thereby cause an unlawful obstruction to a navigable stream.

"This construction of the original act incorporating the defendants is the necessary result of a fair construction of the language of the act, applied to the subject-matter. It follows, as a necessary consequence, that if the draws, as they are now constructed in the defendants bridge, are not suitable and proper for

the convenient accommodation of all vessels having occasion to navigate the river, but are deficient in their construction, mode of operation, or dimensions so as unreasonably and unnecessarily to impede their passage through them, then the defendants are guilty of a public nuisance, which subjects them to indictment. Angell on Tide Waters, 115; Russell on Crimes (7th Amer. ed.), 378, 379; *The King* v. *Ward*, 4 Ad. & El. 384.

"Whether the defendants have, in fact, complied with the terms of their charter by constructing their draws in a suitable manner, so as not unreasonably or unnecessarily to obstruct or impede public navigation, is a question which neither the legislature nor the defendants can determine absolutely, without the assent of the other, where it is drawn in question between the defendants and the commonwealth. Like all other matters involving a controversy concerning public duty and private right, it is to be adjusted and settled in the regular tribunals, where questions of law and fact are adjudicated on fixed and established principles, and according to the forms and usages best adapted to secure the impartial administration of justice."

Reservation to joint resolution of March 3, 1869, alternative.

In developing the full meaning of the reservation in the joint resolution of March 3, 1869, it is to be observed that the right reserved to Congress is in the alternative. It is "in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this resolution," the right "*to withdraw the assent hereby given, or to direct the necessary modifications and alterations of said bridge.*"

May withdraw assent, either *absolutely* or *on condition*.

This, it is evident, means that in the event contemplated, Congress may withdraw its assent, either *absolutely* or *on condition*—that is, unless the company consent to make such modifications and alterations of the bridge as may be required. Congress, of course, has no power directly to compel the specific performance

by the company of any particular work of alteration ordered. It could only do so indirectly, by making its performance a condition of the continuance of its assent to the lawfulness of the structure. All, therefore, that in any contingency Congress reserved the right to do, was to withdraw the assent given by the resolution. To do that would leave the company, supposing its bridge in the meantime to have been built in whole or in part, in the same condition precisely in which it would have been in case it had built such a bridge without any express assent given by Congress. Its position would then have been, that it would have been subject, on proper complaint and judicial proceeding and decree, upon proof of the fact that it was a material and substantial obstruction to the free navigation of the river, to abatement; but with the opportunity of either escaping any such inquiry altogether, or, if one were instituted, of establishing its claim to be considered a lawful structure on the ground of not being an unlawful obstruction to navigation. We have already seen that the mere absence of express legislative assent on the part of Congress would not make it unlawful.

Congress could do no more than withdraw assent.

That would leave the company as if such assent had never been given.

This, then, on any possible construction of the joint resolution, is what was stipulated between the parties: In consideration that the company will build a bridge of the prescribed character, it shall have the privilege of maintaining the same as a lawful structure, but Congress reserves the right only, at any time and for any reason, to withdraw the assent thereby given—that is, to put an end to the contract.

Now, what Congress, in fact, has done, has been,

not merely to *rescind* the former contract even in that form, but to *break* it. It has not been satisfied simply to withdraw its assent as given by the joint resolution, and permit, as it agreed to do, the bridge to stand or fall, upon its merits, as the facts should justify. It has gone further. It has not only abrogated the contract, but also the *status in quo* of the parties, considered as if no contract had been made. It has not only repealed the rule of decision established by the joint resolution, but has made a new one in place of that which subsisted before the joint resolution was passed. It has not said "the lawfulness of your structure, so far as it depends upon the assent given, is taken away," but it has said "that it shall be *unlawful* for the Newport and Cincinnati Bridge Company, or any other company or person, to proceed in the erection of the bridge now being constructed," etc. And this is what, by no construction of the contract between the parties, it had any right to do; and it is therefore impossible to escape from liability for the consequences of a breach of that contract.

Congress went further, and by the act of March 3, 1871, not only withdrew its assent, but made the structure positively unlawful.

To determine what those consequences have been to the complainant, it now becomes material distinctly to ascertain and present what and what kind of rights had become vested in it, by the construction of its bridge under the law, at the time when its completion and use were forbidden.

What rights of property of complainant had become vested.

They were, as we claim, as follows:

1. The franchise under its charter from Kentucky and Ohio to construct, maintain, and use for profit, its bridge, subject, of course, to the result of any judicial determination to the contrary.

2. That franchise, as confirmed by the joint resolution of March 3, 1869.

3. The property in the structure as far as it progressed, represented by its cost, but the value of which depended altogether on the continuance of the right to complete and use it as a bridge.

These rights, however else described, constitute property. They were property.

"The term '*property*,' when applied to lands, comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract; those which are executory as well as those which are executed." *Soulard* v. *United States*, 4 Peters, 511. *Soulard* v. *U. S.*, 4 Peters, 511.

"A ferry license when granted becomes the property of the grantee, and is a private right, subject only to the governmental control growing out of its other nature of *publici juris*. Where granted in an estate for years, the death of the grantee can no more terminate it than the death of a tenant can terminate a life estate in lands." *Lippencott* v. *Alexander*, 27 Iowa, 460; 1 Am. Rep. 299; *Benson* v. *Mayor of New York*, 10 Barb. 223.

In this character it is essentially in all respects *property*, and is governed by the same rules as to its enjoyment and protection, and regarded by the law precisely as other property.

Conway v. *Taylor's Ex'rs*, 1 Black, 632.
Bowman's Devisee v. *Watham*, 2 McLean, 376.
Dundy v. *Chambers*, 23 Ill. 370.
2 Kent Com. 458.

The Supreme Court of the United States, in the *West River Bridge Co.* v. *Dix*, 6 How. 534, say: *West River Bridge Co.* v. *Dix*, 6 How. 534.

"A franchise, therefore, to erect a bridge, to construct a road, to keep a ferry, and to collect tolls upon them, granted by the au-

thority of the state, we regard as occupying the same position, with respect to the paramount power and duty of the state to promote and protect the public good, as does the right of the citizen to the possession and enjoyment of his land under his patent or contract with the state, and it can no more interpose any obstruction in the way of their just exertion."

Pennsylvania College Cases, 13 Wall. 214.

In the *Pennsylvania College Cases*, 13 Wall. 214, the Court said:

"Private charters, or such as are granted for the private benefit of the corporators, are held to be contracts because they are based for their consideration on the liabilities and duties which the corporators assume by accepting the terms therein specified, and the grant of the franchise on that account can no more be resumed by the legislature, or its benefits diminished, or impaired, without the assent of the corporators, *than any other grant of property or legal estate*, unless the right to do so is reserved in the act of incorporation, or in some general law of the state, which was in operation at the time the charter was granted." Cooley, Const. Lim. 279; *Binghamton Bridge Case*, 3 Wall. 51; *Piqua Bank* v. *Knoop*, 16 How. 369; *Vincennes University* v. *Indiana*, 14 How. 268; *Planters' Bank* v. *Sharp*, 6 How. 301.

"Nothing is better settled than that the franchise of a private corporation—which in its application to a railroad is the privilege of running it and taking fare and freight—is *property* and of the most valuable kind, as it can not be taken for public use even, without compensation." *Wilmington Railroad* v. *Reid*, 13 Wall. 268; Redfield on Railways, 129, § 70.

Wilmington Railroad v. *Reid*, 13 Wall. 268.

The Queen v. *Cambrian Railway Co.*, L. R., 6 Q. B. 427.

In the case of the *Queen* v. *Cambrian Railway Co.*, L. R., 6 Q. B. 427, COCKBURN, C. J., said:

"I think there can be no doubt that a ferry being a franchise, is an 'hereditament.'"

Ricket v. *Met. R'y Co.*, L. R., 2 H. L. 175.

Brand v. *Hammersmith*, L. R., 4 H. L. 171, distinguish'd

Lord COKE says:

"An hereditament is by much the largest and most comprehensive expression, for it includes not only lands and tenements,

but whatsoever may be inherited, be it corporeal or incorporeal, real, personal, or mixed (Co. Litt. 6*a*, cited in 2 Bl. Com. 17), and Blackstone, in the chapter on incorporeal hereditaments (2 Bl. Com., ch. 3, p. 21), amongst the various descriptions which he enumerates, mentions 'franchises.' That a 'ferry' is a franchise there can be no possible doubt; and, therefore, a ferry would come within the term 'land,' as used in the statute." . . . .

"We are not dealing with some thing accessory and incidental to the possession and ownership, but with that which constitutes the very hereditament itself. Here, the franchise of conveying people by this ferry and of taking toll in consideration of the services thus rendered to the public, is the very thing itself, which the construction of this bridge, by the opportunity thus afforded to the public of evading the use of the ferry, of necessity, not only injuriously affects, but practically destroys. It leaves, no doubt, the right to the owner of keeping his boat; it leaves him the right of ferrying across the river such passengers as choose to go, and taking the toll for the service thus rendered; but it entirely annihilates the value of the franchise of the ferry, because if the public have a bridge to go over by, they will not go by the ferry. Therefore, what the legislature has authorized to be done is not some thing which affects the property incidently and remotely, or in a secondary point of view, but which affects the very body of the property itself." . . . .

"The franchise here is of the very essence of the thing, and which one can not say is accessory to any thing else; it is the very life and body of it."

The present case is still stronger. The franchise is that which gives its whole value to the bridge. Without the right to use it as a bridge, which is the franchise, the material and structure would be absolutely without value, for it could be put to no other use. And it is this right which is taken entirely away.

This *property* having become *vested* in the complainant, according to the terms of the law, existing at the

Act of March 3, 1871, deprived the complainant of its property *without due process of law.*

time, including those of the joint resolution of March 3, 1869, the prohibition in the act of March 3, 1871, which made illegal its further prosecution and further use, *deprived the complainant of its property, without due process of law.*

Taylor v. *Porter*, 4 Hill, 146.

"The words 'due process of law' in this place," says C. J. BRONSON, in *Taylor* v. *Porter*, 4 Hill, 146, "can not mean less than a prosecution or suit, instituted and conducted according to the prescribed forms and solemnity for ascertaining guilt or determining the title to property. It will be seen that the same measure of protection against legislative encroachment is extended to life, liberty, and property; and if this latter case be taken without a forensic trial and judgment, there is no security for the others. If the legislature can take the property of A. and transfer it to B., they can take A. himself, and either shut him in prison, or put him to death." . . .

"It must be ascertained *judicially* that *he has forfeited his privileges*, or that some one else has a superior title to the property he possesses, before either of them can be taken from him."

"Due process of law undoubtedly means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. Such an act as the legislature may, in the uncontrolled exercise of its power, think fit to pass, is in no sense the process of law designated by the constitution." . . "The provision was designed to protect the citizen *against all mere acts of power, whether flowing from the legislative or executive branches of the government.*" *Westervelt* v. *Gray*, 2 Kern. 212.

Westervelt v. Gray, 2 Kern. 212.

Murray's Lessee v. *Hoboken Land and Imp. Co.*, 18 How. 283.

The following extract from the opinion of CURTIS, J., in *Murray's lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 283, has special application in the present case:

"Though generally both public and private wrongs are redressed through judicial action, there are more summary extra-judicial remedies for both. An instance of extra-judicial redress

of a private wrong is, the recapture of goods by their lawful owner; of a public wrong, by a private person, is the abatement of a public nuisance; and the recovery of public dues by a summary process of distress, issued by some public officer authorized by law, is an instance of redress of a particular kind of public wrong, by the act of the public through its authorized agent. There is, however, an important distinction between these. Though a private person may retake his property, or abate a nuisance, he is directly responsible for his acts to the proper judicial tribunals. His authority to do these acts depends not merely on the law, *but upon the existence of such facts* as are, in point of law, sufficient to constitute that authority; and he may be required, by an action at law, *to prove these facts;* but a public agent, who acts pursuant to the command of a legal precept, can justify his act by the production of such precept. He can not be made responsible in a judicial tribunal for obeying the lawful command of the Government; and the Government itself, which gave the command, can not be sued without its own consent . . . It is equally clear that the United States may consent to be sued, and may yield this consent upon such terms and under such restrictions as it may think just. Though both the marshal and the Government are exempt from suit, for any thing done by the former in obedience to legal process, still Congress may provide by law that both, or either, shall in a particular class of cases, and under such restrictions as they may think proper to impose, come into a court of law or equity, and abide by its determination. *The United States may thus place the government upon the same ground which is occupied by private persons who proceed to take extra-judicial remedies for their wrongs, and they may do so to such extent and with such restrictions as may be thought fit.*"

The rule, as it applies in the case of a private person, is thus stated in *Rockwell* v. *Nearing*, 35 New York, 302:

Rockwell v. *Nearing*, 35 N. Y. 302.

"The legislature transcends the limits of its authority, when it enacts that one citizen may take, hold, and sell the property of another without judicial process and *without notice* to the owner,

as a mere penalty for a supposed private injury. Such an enactment is within the terms and intent of the provision in the bill of rights that no person shall be deprived of life, liberty, or property without due process of law."

Upon this topic, the utterances of the Supreme Court of the United States are the most authoritative, not only on account of the dignity and rank of the tribunal, and the luster of the names which have adorned its history, but from the greatness of the occasions and controversies which they have signalized and composed.

Fletcher v. Peck, 6 Cr. 135.

In *Fletcher* v. *Peck*, 6 Cranch, 135, C. J. MARSHALL said:

"For although such powerful objections to a legislative grant as are alleged against this may not again exist, yet the principle on which alone this rescinding act is to be supported may be applied to every case to which it shall be the will of any legislature to apply it. *The principle is this: That a legislature may by its own act divest the vested estate of any man whatever for reasons which shall by itself be deemed sufficient.*

"The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass, and that one legislature can not abridge the powers of a succeeding legislature.

"The correctness of this principle, so far as respects general legislation, can never be controverted. *But if an act be done under a law, a succeeding legislature can not undo it.* The past can not be recalled by the most absolute power. Conveyances have been made, these conveyances have vested legal estates, and if these estates may be seized by the sovereign authority, still, that they originally vested is a fact and can not cease to be a fact.

"*When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law can not divest those rights;* and the act of annulling them, if

legitimate, is rendered so by a power applicable to the case of every individual in the community.

"It may well be doubted whether the nature of society and government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation.

"To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public be in the nature of the legislative power, is well worthy of serious reflection."

In the case of *Terrett* v. *Tayler*, 9 Cranch, 50, it is said by the Court: *Terrett* v. *Tayler*, 9 Cr. 50.

"A private corporation created by the legislature may lose its franchises by a misuser or a non-user of them; and they may be resumed by the government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture. This is the common law of the land, and it is a tacit condition annexed to the creation of every such corporation. Upon a change of government, too, it may be admitted that such exclusive privileges attached to a private corporation as are inconsistent with the new government may be abolished. In respect, also, to public corporations which exist only for public purposes, such as counties, towns, cities, etc., the legislature may, under proper limitations, have a right to change, modify, enlarge, or restrain them, *securing, however, the property for the uses of those for whom and at whose expense it was originally purchased.* But that the legislature can repeal statutes creating private corporations, or *confirming to them property already acquired under the faith of previous laws*, and by such repeal can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporation, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and letter of the constitution of the United States, and upon

the decisions of most respectable judicial tribunals, in resisting such a doctrine."

Bk. of Columbia, v. *Okely*, 4 Wheat. 244.

In the *Bank of Columbia* v. *Okely*, 4 Wheat. 244. Mr. Justice JOHNSON said, referring to this maxim:

"As to the words of Magna Charta incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: That they were intended *to secure the individual from the arbitrary exercise of the powers of government*, unsustained by the established principles of private rights and distributive justice."

"The sovereign who acquires an inhabited territory, acquires full dominion over it; *but this dominion is never suffered to divest the vested rights of individuals to property.*" *Delassus* v. *United States*, 9 Peters, 133.

Delassus v. *U. S.*, 9 Pet. 133.

Soc'y, etc., v. *New Haven*, 8 Wheat. 464.

The case of the *Society for the Propagation of the Gospel, etc.* v. *New Haven*, 8 Wheat. 464, furnishes another application of the principle. It was there decided that the property of British corporations in this country was protected by the sixth article of the treaty of peace of 1783 in the same manner as that of natural persons; and their title thus protected, was confirmed by the ninth article of the treaty of 1794, so that it could not be forfeited by any intermediate legislative act or other proceedings for the defect of alienage.

"But even if it were admitted," says the Court, "that the plaintiffs are not within the protection of the treaty, it would not follow that their right to hold the land in question was divested by the act of 1794, and became vested in the town of New Haven. At the time when this law was enacted, *the plaintiffs, though aliens, had a complete, though defeasible, title to the land, of which they could not be deprived for the cause of alienage but by an inquest of office;* and no grant of the state could,

upon the principles of the common law, be valid until the title of the state was so established. (*Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch, 503.)" . . .

"But there is a still more decisive answer to this objection, which is that the termination of a treaty can not divest rights of property already vested under it. If real estate be purchased or secured under a treaty, it would be most mischievous to admit that the extinguishment of the treaty extinguished the right to such estate. In truth, it no more affects such rights than the repeal of a municipal law affects rights acquired under it. If, for example, a statute of descents be repealed, it has never been supposed that rights of property already vested during its existence were gone by such repeal. Such a construction would overturn the best established doctrines of law and sap the very foundation on which property rests."

In *Wilkinson* v. *Leland*, 2 Peters, 657, it was said by Justice STORY: *Wilkinson* v. *Leland*, 2 Pet. 657.

"That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being, without very strong and direct expressions of such an intention."

In *Webster* v. *Cooper*, 14 Howard, 503, the Court said: *Webster* v. *Cooper*, 14 How. 503.

"The result of the decision is that the constitution of the state has secured to every citizen the right of 'acquiring possessing and enjoying property,' and that by the true intent and meaning of

this section, property can not, by a mere act of the legislature, be taken from one man and vested in another directly; *nor can it, by the retrospective operation of law, be indirectly transferred from one to another, or be subject to the government of principles in a court of justice, which must necessarily produce that effect.*" *Kennebec Purchase* v. *Laboree*, 2 Greenl. 275; *Oriental Bank* v. *Freeze*, 18 Maine, 109; *Austin* v. *Stevens*, 24 Maine, 520.

McCready v. *Sexton*, 29 Iowa, 356.
Cooley, Const. Lim., 368.
Blackwell on Tax Titles, 98-112.

The principle stated in the extract just read, was applied in the case of *McCready* v. *Sexton*, 29 Iowa, 356; 4 Am. Rep. 214, where it was decided that an act of the legislature declaring a tax deed conclusive evidence that all the essential requirements of the law regulating the exercise of the taxing power had been complied with, was unconstitutional and void.

The ground of decision is, that under the form of a law prescribing a rule of evidence, the legislature deprives a man of his property without due process of law. The objection was not that the law was retrospective, for it was not; but that it was not competent for the state, whose right to sell the property of its citizens for non-payment of taxes depended upon the existence of the *facts* which constitute a default, to ascertain the *facts* for itself, or provide a rule of evidence in respect to their proof, which should exclude the party interested in the question from contesting it. The application of the precedent to the present case is striking.

Yo Semite Valley Case, 15 Wall. 87.

In the *Yo Semite Valley Case*, 15 Wall. 87, the Court explains the principle of the pre-emption laws and the previous decisions of the Court upon them, and decides that:

Frisbie v. *Whitney*, 9 Wall. 196;

"The power of regulation and disposition conferred upon Congress by the constitution only ceases when all the preliminary

acts prescribed by those laws for the acquisition of the title, including the payment of the price of the land, have been performed by the settler. When these pre-requisites have been complied with, the settler for the first time *acquires a vested interest in the premises occupied by him, of which he can not be subsequently deprived.*

Lytle v. *Arkansas*, 9 How. 333; *Delassus* v. *U. S.*, 9 Pet. 133; *Smith* v. *U. S.*, 10 Pet. 330; *U. S.* v. *Fitzgerald*, 15 Pet. 407; *Stark* v. *Starrs*, 6 Wall. 418. *Yates* v. *Milwaukee*, 10 Wall. 504.

In *Yates* v. *Milwaukee*, 10 Wall. 504, it was decided that, among the rights of a riparian proprietor, an

"Access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier, for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be." . . . "*This riparian right is property* and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it can not be arbitrarily or capriciously destroyed or impaired. *It is a right which, when once vested, the owner can only be deprived in accordance with established law*, and if necessary that it be taken for the public good, upon due compensation." . . .

"But the mere declaration by the city council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities."

The decree was accordingly reversed with instructions to enter a decree enjoining the defendants below from interfering with the plaintiff's wharf, reserving, however, the right of the city to remove or change it

so far as might be necessary in the *actual* improvement of the navigability of the river, *and upon due compensation made.*

Osborn v. *Nicholson*, 13 Wall. 662.

The case of *Osborn* v. *Nicholson*, 13 Wall. 662, brought into discussion the question of the effect of the 13th amendment to the Constitution of the United States, prohibiting slavery throughout the Union, in its operation upon a previous contract, the consideration of which was a sale of slaves, in a state where it was then lawful.

Mr. Justice SWAYNE, delivering the opinion of the Court, said:

"But without considering at length the several assumptions of the proposition, it is a sufficient answer to say that when the 13th amendment to the Constitution of the United States was adopted, the rights of the plaintiff in the action had become legally and completely vested. Rights, acquired by a deed, will, or contract of marriage, or other contract, executed according to statutes subsequently repealed, subsist afterwards, as they were before, in all respects as if the statutes were still in full force. This is a principle of universal jurisprudence. It is necessary for the repose and welfare of all communities. A different rule would shake the social fabric to its foundations and let in a flood-tide of intolerable evils. It would be contrary to 'the general principles of law and reason,' and to one of the most vital needs of government. (*Calder* v. *Bull*, 3 Dallas, 388.) The doctrines of the repeal of statutes and the destruction of vested rights by implication, are alike unfavored in the law. Neither is to be admitted unless the implication is so clear as to be equivalent to an explicit declaration. Every doubt should be resolved against a construction so fraught with mischief. There is nothing in the language of the amendment which in the slightest degree warrants the inference that those who framed, or those who adopted it, intended that such should be its effect. It is wholly silent upon the subject. The proposition, if carried out in this case, would in effect take away one man's property and give it to another; and the deprivation would

gage, a Welch mortgage, a *vadium vivium*, or to what particular class of securities it might belong. A legal metaphysician might indulge in lengthy speculations upon that subject, and end with no increased light upon the vital questions before this Court, viz., what are the rights of these parties in relation to this property? The plain language of the act of 1842, above quoted, is: "*And for "the purpose of paying for said work, the rents that may be "received by the State, for water-power created by this act, "shall be appropriated for that purpose, and to no other pur-"pose;* and the person or persons doing the said work "shall look to the said rents for their pay, and to no other "source whatever, and as fast as said rents may be due or "received, *they shall be expended in paying for the said work "until the whole amount is paid.*"

No stronger language could possibly have been used to express the clear intention of the Legislature that whoever should invest their money and labor in doing the proposed work should have the rents and profits arising from it for their compensation; and that such rents and profits were, and forever should be, exclusively devoted to the payment of the debt so to be incurred. This was the language of a sovereign State, making a proposal which, when accepted and complied with, should become a binding contract upon her. There is no obscurity in this expression of intention of this high contracting party; and that it might never be truthfully said that the State was creating and baiting a trap, whereby it might obtain the labor and money of the party who might do this work, with no security that any rents and profits would ever arise from the water-power

created whereby payment could be made, the Legislature immediately follows the provision above quoted with an imperative direction to the agent of State in charge of the work to lease the water-power to the extent of not exceeding thirty run of stone, and to the purchase of not exceeding four acres of ground in connection with said water-power to make it available.

When this proposal was made by the State, and accepted and acted upon by Spears & Case, and the work required by the State fully performed by them, it became more than a mere pledge, a mortgage, or a lien. It was an *absolute grant*, for a consideration received, of all the rents and profits which might thereafter arise from this water-power, not to exceed thirty run of stone, limited only by the requirement that the navigation of the canal should not be interfered with, and a direction to the agent to collect those rents and pay them to Spears & Case in satisfaction of their claims for this work.

No legislative appropriation for the payment of these revenues was needed to authorize the agent in charge of the work, and who received the rents, to pay them over to Spears & Case. These rents did not need to go into the treasury at all. The principles of the cases of *Ristine* v. *The State*, 20 Ind., 328, and *State* v. *Ristine*, *id.* 345, upon this subject do not apply.

Suppose this contract had been made between individuals standing upon an equal footing, with power in Spears & Case to obtain redress against the other party for any failure to comply with its terms, can it be doubted for a

moment that a court of equity would, upon a proper showing, have decreed in their favor a specific performance of the stipulation to pay in the manner described?

The State could not be sued, like an individual, to enforce this contract, or for its breach; but the State can no more pass a law impairing the obligation of its own contract than it can impairing the contract of other parties. Whatever legislation the State enacted for the purpose of transferring to any one else the canal property, could in no respect whatever impair the rights of Spears & Case, or appellants, or in any respect change them to their prejudice from what they would be independent of such transfer.

And so the trustees to whom the transfer from the State was made evidently understood the effect of the transfer, as they continued to pay these rents, as the bill shows, down to the time when the canal property was sold under the decree in the original case.

When the original suit was brought by Gapen, the original complainant, as a holder of the canal stock issued under the acts of 1846 and 1847, on behalf of himself and other such stock holders, it was only to enforce such rights as were conferred upon them by that legislation. Independent of that they had no rights whatever against this canal property. They received their stock, on which alone any right was predicated in the original bill, solely under those acts. Those acts explicitly defined the trusts upon which the canal property was conveyed to the canal trustees. The eighth section of the act of 1846 specifies upon what trusts and to what uses the property directed to be

conveyed by the Governor's deed, which included every thing connected with the canal, was to be held by the trustees to whom it was to be conveyed. These were: First—The proceeds of the lands donated by the General Government, to aid in the construction of the canal, sold and unsold, were to be applied to the repayment of sums advanced for the completion of the canal, and for work, etc., in the further prosecution of the work; and, Second—The balance of the proceeds of such lands and the *tolls* and *revenues* of said canal, up to January 1, 1853, after defraying all needful expenditures for repairs, etc., were to be applied:

1st. To the payment of interest on sums advanced for the completion of the canal to Evansville, and the remainder to pay the balance of the principal of such sums.

2d. To pay to subscribers advancing said sums two and one-half per cent. interest on the principal of the bonds they surrendered.

3d. To pay in full the interest at five per cent. on the special stock for arrearages and accruing interest charged over against the canal, and to pay the principal of said stock.

4th. To pay in full any other holder of any certificate of stock authorized by this act, interest at two and one-half per cent. on the amount of principal thereof.

5th. To pay into the State Treasury any remaining balance to be applied by the State to the redemption of outstanding stocks created by this act.

Provided, "That if the tolls and revenues of said canal "shall be insufficient for all the purposes aforesaid, then "they shall be applied, *pro rata*, among the respective "parties entitled thereto, first paying in full those entitled, "and so on *toties quoties*."

After 1853, the tolls and revenues of that part of the canal between Lafayette and the Ohio State line were to be kept separate from those derived from the residue of the canal, and after defraying certain expenses were to be first applied to make the full interest of five per cent. on certificates of stock to be issued for the outstanding Wabash and Erie Canal bonds, or if insufficient *pro rata* thereon; and if more than sufficient the *surplus to be added to the tolls and revenues to be derived from that part of the canal between Lafayette and Evansville, and the same to be applied as the said act before provided.*

The 10th section of the act gives the trustees full authority to sell and convey the lands donated by the general government, and to receive the proceeds of such sales, and all tolls and revenues arising from the canal.

The 12th section provides for terminating the trust "Whenever the moneys advanced for the completion of "said canal, with the interest and the special stock afore- "said, shall have been paid and refunded, and the State "shall have taken up and retired one-half of the stock "issued by virtue of the first section of this act, and shall "assume the payment of interest at the rate of five per "centum per annum on the balance, which the State "reserves the right of doing at its pleasure."

Throughout the entire act of January 19, 1846, there is no pretense of an authority conferred upon the trustees to *sell the canal*, of their own volition, in any event, or authorizing hostile proceedings against them for the purpose of obtaining such sale by order of any judicial tribunal, but the evident intention of the Legislature was that the property in the canal itself was to remain in the hands of the trustees, or be returned to the State upon the contingencies provided for.

In the thirty-second section it is provided, among other things, that the stock shall be "paid and redeemed, and *only* paid and redeemed, *out of said canal land, and the tolls and revenues of said canal*, as provided in the eighth section of this act;" and further, that as to the half of the principal and interest represented by this stock "the "holders of said certificates shall look *solely* and *exclu-* "*sively* to said canal lands and the tolls and revenues of "said canal, as provided in the eighth section aforesaid "of this act."

In the first section of the act of January 27, 1847, after providing for the remainder of the outstanding bonds of the State in accordance with the option reserved by the State by the thirty-second section of the act of January 19, 1846, and the issue of two certificates, each for an equal moiety of the principal of such surrendered bond, to bear interest at five per cent. after January 1, 1847, one of which certificates should be paid out of the revenues of the State, it is provided that the other certificate, with the interest thereon, shall be paid out of the canal lands, "and the tolls

"and revenues of the said canal," as provided by said thirty-second section.

Throughout this entire act the idea is prominently kept to the front that the *donated lands* and the *tolls* and *revenues of the canal* are the *sole means* thereby provided for the payment of the one moiety of the bonds, for which certifi cates were to be issued.

It can not be contended, therefore, that either the act of 1846 or 1847, in terms, or by legitimate construction, authorized the sale of the canal itself to satisfy the indebtedness evidenced by those certificates. Whatever power existed in the court below to decree such sale was by virtue of the principles of *general equity*. The money of the holders of this stock had gone into the creation of this trust property, which, from unforeseen causes, had turned out not to yield the anticipated revenue, and to afford no means from its revenues alone to pay the debt, and discharge the trust that had been charged upon them. There arose under the general principles of equity, a right in the stockholders to have their debt paid out of the property which their money had created. It was a property useless to any one in the condition in which the legislation of the State had left it. By the act of 1857 the State had renounced all intention of redeeming the canal, but had made no further provision to enable those who had invested their money in its construction to be reimbursed otherwise than by its tolls and revenues. By the constitutional amendment of 1873, the State had probibited its Legislature from paying any certificates payable exclusively

from the proceeds of the canal lands and the tolls and revenues of the canal (1 R. S. of 1876, 40, sec. 7); but still no provision was made, or had been up to the commencement of this suit, to make the canal itself, and property belonging thereto, available towards paying the debt for its construction.

Under such circumstances the ordinary principles of equity attach with more than ordinary force to the claim of the stockholders to have the property, which their money has created, used to satisfy their debt incurred in its creation. Here was an unproductive property, cast off and repudiated by the State, constantly depreciating in value, with no possibility of ever furnishing the tolls and revenues to which these creditors were to look for their pay, and with no possibility of ever satisfying any portion of their claims but by its sale. Tied up as it was by the legislation of 1846 and 1847, and the acts of the parties interested pursuant thereto, the naked question presented to a court of equity in the suit brought by the stockholders is: Shall the terms of this legislation and these contracts be adhered to, and this property be suffered to go utterly to decay, doing no good to any one, or shall it be taken charge of by the Court, and made available as far as possible toward payment of these just claims incurred in its creation? The mere statement of this question carries with it, in a court of equity, its own answer. The State, the creator of the trust, has repudiated all interest in it, or responsibility for it by the solemnity of a constitutional amendment. The *cestuies qui trust*, the stockholders, are the only parties to that legislation having interests to be

protected. It is simply just, *ex acquo et bono,* that their rights should be protected as far as they can be without prejudice to the rights of others. The State having no rights, the only parties other than the stockholders interested are those whose rights have been expressly secured by the clause above quoted from the eighth section of the act of 1846, and which we here again quote, as follows, viz.: "*Subject nevertheless to all existing rights and equities against the State on account of the same, or any part thereof, or liabilities of the State growing out of or in relation thereto.*

Here most forcibly comes in the application of the equitable maxim that "he who seeks equity must do equity" As we have abundantly shown, the complainants in the original bill stand alone in a court or equity upon their right to compensation out of the fund of property which their money has created. But four years before this legislation of 1846 and 1847, which gave them any rights whatever against the canal property, and when they held simply the bonds of the State, payable only out of the general revenues of the State, the appellants in this intervening petition had expended their money and labor in creating a part of the very property that the original complainants ask, and have obtained, a decree to have sold to satisfy their debt. True, appellants were to be paid solely out of the rents of the water-power created, just as the original complainants were to be paid solely from the proceeds of the sale of the canal lands, and the tolls and revenues of the canal, but in each case there has been the same failure of the means provided to yield the necessary revenue. Notwithstanding all payments, the interest

on the sum due Spears & Case has gone on steadily increasing until from $10,354.20, the original amount due, it has arisen to $24,678.84, as shown by the account attached to the intervening petition. The money and labor of Spears & Case created the water-power at Delphi, just as the money of the stockholders created the main line of the canal. The means provided for their payment, and to which they were to look exclusively, have failed as signally and utterly as the means provided for the payment of the stockholders, and to which they were to look exclusively. Both stand in that respect upon precisely the same equity. No equitable principle exists upon which the entire proceeds of the sale of both the water-power and the canal can be appropriated to the payment of the stockholders, no part of whose money went into the water-power, while those whose money and labor created the water-power are to be turned out of court without a farthing.

Especially is this the case where, as here, appellants have the older equity. We think the legal maxim *qui prior est tempore, potior est jure,* applies here with peculiar force. Nor is it any answer to this proposition that it would be difficult to ascertain with precision the relative rights of the stockholders and appellants. The principle governing the voluntary wrongful admixture of goods as against the wrong doer, does not apply here, and the fact that the dividing line between the interest of appellants and the interests of the stockholders in the fund arising from the sale of the canal property can not be certainly drawn with precise accuracy, furnishes no reason why the

entire right of appellants shall be wiped out and their property or interest be bestowed in a body upon the stockholders. Yet there is no other ground upon which the action of the court below sustaining the demurrer of Gapen, the original complainant, and dismissing the intervening petition of these appellants for want of equity, can be sustained. If appellants have any rights at all to any part of the funds arising from the sale of the canal property, then was eminently the time, and the court below, the forum, when and where those rights should be asserted, while those funds were under the control of that court. Some *approximation* at least can be made towards determining the relative rights of appellants and the stockholders in the funds derived from the sale of the canal property, so that appellants can secure *something* for the property which their money and labor has created. By the ordinary reference to a master to take testimony, the relative rights of these parties in the fund can be as closely ascertained as in similar cases daily arising in courts of equity which are so referred. But to obtain anything at all they must have a standing in court as intervening creditors, which the action of the court has denied them. As to these funds in the hands of the court, they are practically told by the court below that they have no rights whatever, and there is no other court where their rights can be asserted.

In the argument of the demurrer below, the case of *Clendenin* v. *Frazier*, 1 Ind. 553, was referred to as being very analagous to the case at bar.

We confess our inability to see the analogy. In that case certain certificates had been issued to Clendenin under an

act of the Legislature which provided that they should be paid out of tolls of the New Albany and Vincennes road not otherwise appropriated. Frazier was merely the superintendent of the road. Clendenin brought his bill in chancery against Frazier to compel payment of the certificates. The complete defense to this suit was that the defendant was an agent only of the State which issued the certificates, and hence no liability existed against him on the promise, and upon this ground the court decided the case. True, the court said it did not think the clause pledging the tolls could operate as a pledge, because, first, the tolls had not then accrued; and, second, the debts to be paid out of them did not exist. But all this was mere *obiter*, and in conflict with the later and more enlightened views of this Court and the Supreme Court of Indiana. *Butt* v. *Ellet*, 19 Wall 544; *Hendrick* v. *Bratton*, 63 Ind. 438.

The case of *Fishback* v. *Woodruff*, 51 Ind. 102, was also relied upon. In that case the State built the Central Canal, and in 1840, by its canal commissioner, leased to one West "so much surplus water not required for the purpose of navigation" as would propel certain machinery for certain rent reserved. The State sold the canal and the purchaser cut off the water. The prayer was that he should be compelled to furnish the supply of water contracted for by the lease from the State. It was held by the court that the canal commissioner, who had made the lease, was the mere agent of the State, and known by all persons to be such; that the leasing of the water-power was a mere incident to the canal and not the purpose of its creation;

and that the lessee took this lease subject to all the vicissitudes of dilapidation, destruction and abandonment, and that as rent accrued from time to time for water furnished the only penalty the State would at any time incur would be a loss of rent. We do not see how this case bears upon the one at bar. That was a lease of an existing water-power upon a rent reserved, creating the ordinary relation of landlord and tenant only, upon the most favorable construction of the contract; the water to be taken from the surplus over the requirements of navigation. Here the Legislature proposed to clear out the bayou from the canal to the Wabash river, "*for the purpose of creating a water-power*" (acts of 1842, page 35), the necessary labor of its creation to be paid for out of the rents of the water-power, not exceeding thirty run of stone. There the supply of water was cut off by the landlord. Here the power still exists and the supply is abundant. Much was said below about there being no liability upon the State or the owners of the canal to keep up the water-power. It will be quite soon enough to discuss the question of that liability when it arises. It has not arisen yet. It will be better to decide this case upon the questions actually arising in it than to go outside and discuss questions that do not belong to it.

We respectfully submit that the action of the court below in turning these appellants out of court and refusing them participation in this fund, can not be sustained on principle or authority.

II. *As to Appellants' Rights as against the Purchasers of the Canal Property.*

But if the Court should be of opinion that the appellants have no rights whatever in or to any part of the fund arising from the sale of the canal property, and that the decision of the court below sustaining the demurrer of Gapen was right, then we insist that the appellants have the right to the rents and revenues received from the Delphi water-power, or which that water-power may be made capable of yielding, to the extent of thirty run of stone, notwithstanding the sale of that water-power with the rest of the canal property; and that said sale can not in the slightest degree affect their right to such rents and revenues; and that as such purchasers are before the court below for all purposes connected with the proper administration of the trust property which the court has ordered sold, the rights of appellants as to the property can be fully adjusted, and if, as we contend, they have an interest in the said property adverse to the interests of the purchasers, those interests can be fully protected. (Rorer on Jud. Sales, 69, Sec. 148, and authorities cited.)

The State has never undertaken to repudiate the contract with Spears & Case, but by the clause which we have twice above quoted from section eight of the act of 1846, has most scrupulously and solemnly guarded it from violation.

That all subsequent grantees of the property take it with only the rights which the State had, and subject to all equities against the State, is a proposition so palpable that it is

unnecessary in this court to discuss it or cite authorities in support of it.

As we have above shown, the contract between the State and Spears & Case, under which this water-power was created, was not a lease, a mortgage or a pledge, but a *specific grant*—a special appropriation of this property to the particular purpose of paying this debt. Stripped of all technical ideas and arbitrary rules, which tend more to darken and confuse than to illustrate the questions in the case, the simple proposition of the State was: "Clean out this bayou, and create a water-power, not for navigation, nor to aid navigation, of the canal, but to create a valuable property in connection with the canal, where nothing of value now exists, and you shall have the rents and profits of the property created, to the extent of thirty run of stone, until you are fully paid."

No Butler bill was then in contemplation, nor were any rights conferred by such bill until four years afterward, when appellants' money had all been invested and the property created.

Now, is it the law, that these stockholders, whose rights against the canal had no existence until four years after this contract was made, and long after the rights of Spears & Case had become complete by the full performance of their contract, can obtain a footing in a court of equity whereby they can utterly extinguish the rights of Spears & Case in this property, and that even without making them parties and giving them a day in court?

We confess that such a proposition is abhorrent to all our ideas of the principles and practices of courts of equity, and we do not think authorities will be found to sustain it.

In the argument below, counsel for the purchasers filed a printed brief, in which a number of authorities were referred to, and extensive quotations copied therefrom. We presume the same authorities will be relied on here, and we will therefore review them now.

The case of *West* v. *Townsend*, 12 Ind. 434, was a sale by an administrator, pursuant to statutes, which expressly authorized an order of the court, upon proper application, to sell real estate of a decedent to satisfy liens created in his lifetime, and did not rest at all upon the general doctrines applicable to judicial sales independent of statutes. In that case the court say that the statute authorized the sale of real estate, *subject* to existing liens, or to *discharge* existing liens, or it might combine both, *as it did in that case*, and the sale for the purpose of discharging liens related back to the date of the oldest lien, and gave the purchaser a title as upon a sheriffs' sale to satisfy that lien. There is something in that case analagous to this.

The case of the *Steamboat Rover* v. *Stiles*, 5 Blackf. 483, was a case where Stiles sought to enforce a claim against the boat, for services, under an act of the Indiana Legislature. It was decided upon principles peculiar to maritime law, which do not apply here.

The case of *Wiswall* v. *Sampson*, 14 Howard 52, was also relied upon. We are unable to discover from the whole scope of the opinion in that case anything supporting appellees' position, that the water power in question is released in the hands of the purchasers from the claim of appellants. The only points decided in that case were, first, that where real estate is in the hands of a receiver, appointed by a court of equity, a sale of that real estate, upon execution issued on a judgment at law, is a nullity; and, second, that if such judgment creditor applies to the court of equity, after making his levy, and asks that effect be allowed to his title, and the court adjudges his title invalid, this is *res adjudicata*.

The entire drift of the opinion is to the effect, that, where property, or a fund, is taken possession of by a court of equity, that court will be scrupulously careful to preserve the rights of all parties interested in the fund, or property, in the order of their priority, and will never assume to affect those rights without having the party interested in some way before it. The following paragraph from the opinion shows its entire character:

"We agree, that the person holding the prior legal lien or encumbrances must have notice of, and an opportunity to come in and claim his prior right to the property, or interest in the fund, before his legal right can be affected; and the proper way is by summons or notice, upon the order or direction of the court."

Surely there is nothing in this language that would give color of sanction to appellees' theory, that, by the decree

in the original action, without notice or knowledge of its pendency, all rights or claims of appellants in the canal or water power property can be extinguished.

The court, in the case last cited, says further: "We do not doubt but that it would be competent for the court, in case the judgment creditor holding the prior lien had not come in and claimed his interest in the equity suit, to decree a sale in the final disposition of the fund subject to his judgment. *The purchaser would then be bound to pay it off.*"

In their brief below, counsel for the purchasers, in speaking of this case, say: "The case of *Wiswall* v. *Sampson*, 14 Howard 52, establishes a principle exactly applicable to the case at bar. * * * The opinion of the court amounts almost to a treatise on the law and practice in cases of this class."

We are entirely content to rest this case upon the principles we have quoted from the opinion in that.

The case of the *Steamboat Raritan* v. *Smith*, 10 Mo. 527, was also referred to. In this case the principles of the maratime law, in connection with the Missouri statutes, were applied, and the case throws no light whatever on the case at bar. By the maritime law, in cases of this character, "all the world are parties," and are presumed to be before the court and assert their rights. *Florentine* v. *Barton*, 2 Wall. 216; *Beauregard* v. *The City of New Orleans*, 18 Howard, 503; *Grignor's Lessee* v. *Astor*, 2 How. 338.

Moore v. *Shultz*, 13 Penn. St. 98, was a sale of real estate, by order of the Orphans' Court of Pennsylvania, on

petition of the administrator, who, in his schedule of debts to be paid out of the proceeds of the real estate, included the mortgage in controversy, and, in his report of distribution of the proceeds, gave the same priority to the mortgage debt as the mortgage held upon the land. The court held that this mode of distribution was proper, and that the sale extinguished the lien of the mortgage. In the course of its opinion the court says: "Liens, the extent or amount of which can not be rendered certain, *are not divested because they could not be made out of the amount produced by the sale.* And liens expressly created by act of assembly (such as the interest of the widow in one-third of the valuation of the land taken by the heir at the appraisement, and the lien or interest of the heirs for that third at the death of the widow) are not divested, because, by the terms of the act the lien continues, into whose hands soever the land may go, until it is paid; and, as it can not, from its very nature, be paid out of the purchase money, the lien must remain."

If the rights of Spears & Case were a mere lien, and not, as we contend they were, an absolute grant and appropriation of the rents of the water power stipulated for, they were a lien created by statute, and the reasoning of the Pennsylvania court above quoted applies with quite as much force in appellants' favor as to the cases referred to therein.

This entire opinion is to the effect, that, where all parties interested in liens upon, or claims against, the property in litigation, are brought before the court, in some mode known to the law, so that they have an opportunity to be heard in

support of their claims, and their rights can be protected and their liens or claims are of that character which can be extinguished by a judicial sale, such sale will extinguish them; and their liens or claims will be transferred to the fund arising from the sale; otherwise, they survive against the property in the hands of the purchaser. And this appears to be the only reasonable, as well as the well settled rule in cases of this character. *Rorer on Judicial Sales*, 94, Sec. 216 and 217; *Id.*, 222 and 223. It would be monstrous for a court of equity to assume to determine the nature, extent and amount of a party's claim, without permitting him to come before it.

The case of *Girard Life Insurance Company*, 57 Penn St. 388, was also referred to. In that case the court held that, in a partition proceeding, where the real estate could not be divided, and a sale was ordered, the liens on the land were transferred from it to the fund.

De Viner v. *Blackstone*, 6 Blatch. 235, was a case where certain holders of mechanics' liens, against property in the hands of a receiver appointed by a court of equity, sought to enforce them. The receiver brought a bill against them to require them to release their lien and look to the fund, and it was so ordered, in accordance with well settled equity principles.

The foregoing are all the authorities referred to by counsel for the purchaser of the canal in the court below. We respectfully submit that not one of them even tends to support the principle upon which alone the decision of the court below, sustaining the demurrer of the purchasers of

the canal to the intervening petition of appellants, can be made to rest, viz: That the rights of appellants in, or to, or against, the Delphi water power, can be entirely divested from the canal property and this water power, and it be sold by the order of court, free and clear of all such claims, without the appellants being in any manner before the court, or having an opportunity to be heard in regard to their rights. In appointing a receiver for property, one of the ordinary things first to be done, after such appointment, is to ascertain who are interested, and the relative priority of claims, and so to administer the property or funds as not to prejudice the rights of any one. 3 Daniel's Ch. Pr. 1978.

It is idle to talk of any claim against the State in favor of appellants. Neither Spears & Case or appellants ever had any claim payable out of the general revenues of the State, or in regard to which any right existed against the State, except simply to have the rents for not exceeding thirty runs of stones, collected by the State and paid over to them. And when the State divested herself of all power to lease or collect rents for this water power, by the transfer of the canal and the water power to the trustees, even that claim against the State ceased and immediately attached to the trustees, and, as the record shows, was recognized and carried into effect by them.

The act of 1842, authorizing the contract to do this work, and the subsequent acts making provision for settling and paying the claim, all being public acts, and notice to the world, the continuous application of the proceeds of

the leases of the Deiphi water power to the payment of this debt, ever since it began to be leased, were certainly matters that would at least put the purchasers of the canal property on inquiry, and they can hardly claim to be innocent purchasers as to the claims of Spears & Case. There was no presumption of payment of the claims from lapse of time.

Neither the State or the trustees of the canal owed Spears & Case a duty in respect to the canal or water-power, in the nature of a personal obligation, but previous to the transfer the State simply undertook to act as trustee for the leasing and collecting of the rents of the water-power, and paying them over to Spears & Case; and after the transfer this trust devolved upon the canal trustees.

The appellants in this case, with their rights originating in an act so solemn and notorious as a public statute of the State, by its mere existence notice to all the world, were not only not made parties to the original suit but when they knocked for admission into the forum where their rights were being extinguished, that they might be heard for their protection, its doors were closed and bolted against them, and they were told that they had no rights which that court was bound to respect.

There is no magic in the phrase "*judicial sale.*" It is one of the means resorted to to enforce and protect rights, and not to extinguish and destroy them. From all the authorities cited below by the appellees' counsel, and reviewed herein, it can not but be apparent, that whenever a judicial sale is ordered, it is only after scrupulous care has been taken to protect the rights of all parties interested in the property to be

sold, and by providing that whatever rights exist against the property itself shall either he preserved and continued against it in the hands of the purchaser, or shall be transferred, with the same priority and preference in every respect as it existed against the property, to the fund arising from the sale. It was this protection of their rights that appellant sought in the court below. If their rights are of such character that they can be enforced against the funds arising from the sale of the canal property, now in the hands of the receiver appointed by the court, as we have attempted to show that they are in the first part of this brief, they ask that they may be so enforced. If they are not of that character, but are of the character which adhere to the property in the hands of the purchasers, as they must be if they can not be enforced against the fund, then they desire that they be protected there.

But what they do most solemly protest against is that this claim, for the payment of which they have patiently waited for now nearly forty years, shall not be summarily wiped out, and forever utterly extinguished, under the forms of judicial proceedings, and in the name of the administration of justice, without their having an opportunity to be heard.

We respectfully submit the following recapitulation of our views in this case:

First. The act of January 20, 1842, authorizing the agent of the State to make the contract and providing an explicit and exclusive means of payment out of rents, to be derived from the property created as the result of the

improvement contracted for, was an express perpetual grant of those rents to the satisfaction of the indebtedness of the State to the parties who should do the proposed work until that indebtedness should be paid.

Second. The passage of this act, the contract with Spears & Case pursuant to it, and their work done under the contract having all occurred while the canal and water-power were the property of the State, the rights of the parties as established by this legislation and contract became fixed, and any subsequent conveyance of the canal and water power under the legislation authorizing it could not affect those rights.

Third. When the State conveyed the canal to the trustees pursuant to the Butler bill it did so subject to all existing rights, equities and liabilities against the State in relation thereto and the rights of appellants so far from being prejudiced by this transfer were expressly protected in it.

Fourth. The trustees only received such title as the State chose by and pursuant to this legislation to convey, and subject to all the claims, rights and equities that the State imposed upon the property conveyed.

Fifth. These trustees could not transfer to another any greater right than they received from the State, nor could they transfer the property relieved from any claim, right or equity existing against it at the time they took it from the State.

Sixth. When they were brought into court by the complainant Gapen, by the original bill, they brought with them the property which was the subject of the trust with which they were charged in the precise condition, so far as the rights of appellants were concerned, as when they received it from the State.

Seventh. These appellants not having been made parties to the record by bill or cross-bill, can be in no way affected by the decrees rendered in the case.

Eighth. At the time of filing their intervening petition, appellants stood in a position to assert whatever rights Spears & Case possessed under their contract with the State, unprejudiced and unaffected by any subsequent legislation or judicial action.

Ninth. At the time appellants' intervening petition was filed, the proceedings in the original cause were still so far *in fieri* that appellants' rights could be fully determined and protected, either out of the fund under the control of the court, or by declaring appellants' rights against the purchasers of the canal property without prejudice to the rights of any other party to this suit.

Tenth. If appellants have any rights at all under the contract of Spears & Case, which are in danger of being infringed, either by the proceedings in the original suit, or by the purchasers under the decree therein, they may and must seek redress by intervening petition.

Eleventh. The spirit of a court of equity is to avoid multiplicity of suits and circinty of action, and to administer

complete relief in a single suit to all parties concerned in the subject of the litigation where it can be done, and to do this all such parties have a right to and must be brought before it.

Twelfth. Either the proceedings resulting in the sale of the canal to which appellants were not parties, have wiped out and annihilated all their rights to compensation for work done under the contract pursuant to the Act of 1842, or they have still an existing right thereto.

Thirteenth. If they have a right to compensation, they have the means of enforcing that right so long as the water-power, out of the rents of which that compensation was to be paid, is in existence; if that is to be treated as sold free from the claims of appellants, so long as the fund is in the hands of the court, enhansed as it must be presumed to have been to the extent of the value of the water-power.

Fourteenth. The question whether the purchasers of the canal under the decre in the original decree, can be compelled to keep up the canal and water-power so as to produce a water-power sufficient to pay rent, was not before the court below, inasmuch as appellants intervening petition shows that the water-power is in fact there, and in part under lease, which will not expire until 1882, from which rents are actually being received, which allegations are by the demurrers admitted to be true.

Fifteenth. If the court had the power to order the sale of the canal to satisfy the claims of the holders of the certificates of stock, and such holders had the right to receive

the proceeds of such sale toward such satisfaction, upon precisely the same principles, appellants, holding a prior grant of the profits of the Delphi water-power for the payment of their claims, have a right to be first paid out of the proceeds of the sale to the amount that the value of the water-power bears to the whole value of the canal.

SHELLABARGER & WILSON,
HILL & NICHOL,

For Appellants.